

lawAfrica

PROCEDURE IN THE LAW OF SUCCESSION



MARY A. ANG'AWA

VISIT...

LANZAROTE
Caliente.COM

**PROCEDURE IN THE
LAW OF SUCCESSION
IN KENYA**

PROCEDURE IN THE LAW OF SUCCESSION IN KENYA

M.A. Ang'awa

lawAfrica

Published by:

LawAfrica Publishing (K) Ltd
Co-op Trust Plaza, 1st Floor
Lower Hill Road
P. O. Box 4260 - 00100 GPO
Nairobi, Kenya
Phone: +254 20 2722579/80
Fax: +254 20 2722592

LawAfrica Publishing (U) Ltd
Office Suite, No. 2
Plot 10A Jinja Road (Opposite NEMA House)
P. O. Box 6198
Kampala, Uganda
Phone: +256 41 255808
Fax: +256 41 347743

LawAfrica Publishing (T) Ltd
Co-Architecture Building, 7th Floor
India/Makunganya Street
P. O. Box 38564
Dar-es-Salaam, Tanzania
Phone: +255 22 2120804/5
Fax: +255 22 2120811

Email: sales@lawafrica.com

Website: www.lawafrica.com

© M. A. Ang'awa 2011; LawAfrica

ISBN 9966-031-12-9

lawAfrica

Copyright subsists in this work. No part of this work may be reproduced or transmitted in any form or means, or stored in a retrieval system of any nature without the prior publisher's written permission. Any unauthorized reproduction of this work will constitute a copyright infringement and render the doer liable under both criminal and civil law.

Application for permission for use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgement of the author, publisher and source must be given.

Whilst every effort has been made to ensure that the information published in this work is accurate, the author, the editors, publishers and printers take no responsibility for any loss or damage suffered by any person as a result of reliance upon the information contained herein

TABLE OF CONTENTS

Preface	xi
Dedication.....	xiii
Table of Statutes.....	xv
Table of Cases.....	xix
List of Abbreviations	xxi
List of Terminologies	xxiii
Chapter 1: Introduction	1
1.1 Origins of the Succession Act.....	1
1.2(a) Statute Law	1
1.2(b) Succession Law under Hindu Law.....	1
1.2(c) Succession Law under Islamic Law	2
1.2(d) The Succession Law under Customary Law.....	2
1.3 Defects of various Succession Laws.....	2
1.3(a) Statutory Law.....	3
1.3(b) The Hindu Law	3
1.3(c) Islamic Laws.....	3
1.3(d) Customary Law	4
1.4 Task of the Commission.....	5
1.4.1 Procedure where a person dies intestate or testate	6
Chapter 2: Jurisdiction	9
2.1 Magistrates Courts	9
2.2 High Court.....	10
Chapter 3: Types of Grant	11
3.1 Grant of Probate	12
3.2 Grant of letters of administration with will annexed.....	13
3.3 Grant of probate of proof of oral will.....	13
3.4 Grant of letters of administration intestate	13
3.5 Resealing (Rule 42(2))	15

3.6 Limited grant (Grant <i>ad colligenda bona</i>)	16
3.7 Grant for special purposes	16
3.7.1 Probate limited for purposes specified in the will Rule 11 of 5 th schedule.....	17
3.7.2 Administration <i>pendete lite</i> schedule 5 rule 10	17
3.7.3 Grant of letters of administration <i>de binis non</i> or probate at rest schedule 5 r. 17.20 rule 12	17
Chapter 4: Death Certificate	19
Chapter 5: Who is entitled to a grant?	21
Chapter 6: Citations	23
Chapter 7: Objections	25
Chapter 8: Confirmation	27
8.1 After 6 months have expired.....	27
8.2 Protest	28
Chapter 9: Revocation	29
Chapter 10: Renunciation	31
Chapter 11: Rectification of Grant	33
Chapter 12: Application under Special Provisions of the Act	35
12.1 Dependant – Section 26 Rule 45.....	35
12.2 Status of Grant	36
12.3 Child to Deceased who died intestate – Section 35(3).....	37
12.4 Discovery of Codicil after Grant of Probate for a Will is proved–Section 61(1) Rule 47	38
12.5 Discovery of Codicil after Grant of Probate for letters of Administration with Will attached- Section 75 Rule 47 (No executor is named)	39
12.6 Discovery of Codicil after Grant of Probate for a Will has been proved- Section 61(2) Rule 48 (1).....	39

12.7 Where no provision is provided for application – Section 49.....	40
Chapter 13: Appeals	41
Chapter 14: Public Trustee	43
Index	45
Case Law	
Re: Maangi [1968] 1 EA 637 (HCK)	47
Hadija v Iddi [1974] EA 50.....	53
Trouistik Union International & another v Jane Mbeyu & another..	61
In the Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000] LLR Number 100014 (HCK).....	73
In the Matter of the Estate of the late Simon Timaiyo Mokosio also known as Simon Nemokoosio (Deceased)	89
Rawal v Mombasa Hardware Ltd. [1968] EA 392.....	101
FORMS	109
Form 1	111
Form 2	113
Form 3	115
Form 5	117
Form 7	119
Form 8	121
Form 9	123
Form 10	125
Form 11	127
Form 12	129
Form 13	131
Form 14	133
Form 14A.....	135
Form 15	137
Form 16	141
Form 17	143
Form 19	147

Form 28	149
Form 31	151
Form 32	153
Form 36	155
Form 37	157
Form 38	159
Form 41	161
Form 43	163
Form 44	165
Form 45	167
Form 47	169
Form 57	171
Form 61	173
Form 62	175
Form 64	177
Form 67	179
Form 68	181
Form 69	183
Form 70	185
Form 70A.....	187
Form 74	189
Form 78	191
Form 79	193
Form 80	195
Form 81	197
Form 82	199
Form 85	201
Form 85A.....	203
Form 86	205
Form 90	207
Form 90B.....	209
Form 96	211
Form 97	213

Form 98 215

Form 99 217

Form 100 219

Form 101 221

Form 102 223

Form 104 225

Form 105 227

Form 106 229

Form 107 231

Form 108 233

Form 109 235

Form 110 237

Form 111 239

Table of Consanguinity 241

PREFACE

1. On my first posting on being appointed as a Judge of the High Court of Kenya, I was assigned to work in Nyeri. Nearly 90% of the cases that arose from this High Court touched on land. In addition I noted that the majority of these cases fell under the Law of Succession, Probate and Administration.
2. After some time at the station, it became evident that a better understanding of this law was required. The members of the bar of the Law Society of Kenya at Nyeri kindly agreed at my request to appoint two advocates to further study the Law of Succession and come up with a report to be held at the bar/bench business meeting.
3. Mr. A. T. D. Ghadhialy Esq. and Mr. H. Waweru Esq. (later Judge of the High Court) were assigned this task on the 13 February 1995, this report went a long way to better the understanding, procedure of coming into court and of having a uniform approach to this law.
4. The Principal Registrar at Nairobi sent a representative who on 25 April 1995 gave us notes on the type of grants, the procedure of applying for grants, objections to making of a grant, revocation, confirmation, death certificate, appeals, purchasers and the use of the index forms.
5. The Act came into force on 1 July 1981. The Commission of the Law of Succession recommended *inter alia* that there should be trainings of this Act to all stakeholders. None had been undertaken.
6. Kenya Women Judges Association, through the leadership of Owuor J as patron and Aluoch J as Chair embarked on the establishment of the Family Division. The brief notes and report were of immense assistance to the committee.

7. Later, training of the Judicial officers including Executive Officers and clerks was conducted by the Kenya Women Judges Association between 2001 and 2005 using these notes.

The notes used during the following training were:

- The Law Society of Kenya, bar association in Eldoret 2001
- The Law Society of Kenya, bar association in Kericho 2009
- Magistrates from the subordinated courts in Kericho and Eldoret region in 2009 and 2010 respectively.

DEDICATION

I dedicate this book in honour of my late parents, the late Dr. James and Mrs. Perez Ang'awa who gave us the best in the way of education.

In the honour of my late brother Toni; Hillary, Charles, William my sisters in-law Brigid and Juni.

To the future generation Ming'edi, Tallo and Edgar.

Thank you for being there.

TABLE OF STATUTES

Administration of Estates Act, 1925	3
African Wills Act.....	2
Children's Act	5
Constitution of Kenya (Amendment) 1964	
s. 14(1).....	47
.....	49
.....	51
Constitution of Kenya	
s. 26(1),(3)	47
s. 26(4)(b)	47
s. 26K	47
Court of Probate Act	58
Civil Procedure Act	
s. 2	56
s. 81	56
.....	105
s. 97	56
.....	102
.....	104; 105
Civil Procedure Rules	
O. 5	9
O. 9	
O. 11 r. 3(2)(d)	9
O. 11 r. (3)(1)(h).....	9
O. 16	9
O. 16 r. 6	98
.....	101
O. 19	9
.....	21
O. 26	9
O. 44	98

O. 45	9
.....	94
O. 50 r. 6	9
Hindu Succession Act	1
Hindu Wills Act (Cap. 158)	1
Indian Succession Act, 1865	1
s. 251	81
s. 222	53
.....	57
.....	81; 82
Indian Succession Act, 1925	
s. 61	94
s. 74	94
s. 191	67
s. 251	57
.....	81
s. 261	93
Intestates Estate Act, 1952	3
Inheritance (Family Provisions Act) 1938	3
Judicature Act, 1925 of England	
s. 3(1)(a)(b)(c)	58
s. 162	81
Kenya colony order in council of 1921	2
Law of Succession Act Cap. 160	
s. 2	63
s. 26	35
s. 35(2)	38
s. 35(3)	35
s. 47-50	9
s. 47	10
s. 56(1)(b)	15
.....	21
s. 58	14

.....	43
s. 67(1).....	76
.....	79
.....	86
s. 68	25
s. 69(1)(2)	26
s. 70	26
s. 71	26
s. 74	33
..... 89; 90; 91	
..... 93; 94	
.....	98
Mohammedan, Divorce and Succession Ordinance of 1920.....	4
Mohammed, Marriage, Divorce and Succession Act (Cap. 156).....	2
Probate and Administration Act.....	48
Probate and Administration Rules	
r. 12	79
r. 14(1).....	33
..... 89; 90	
.....	92
.....	95
..... 98; 99; 100	
r. 36	79
r. 40(3)(a)(b)(4)	27
r. 43	89
..... 92; 93	
.....	95
r. 43(1).....	93
.....	96
.....	100
.....	237
r. 49	89
r. 73	89

Probate and Administration of Estate Act, 1881	1
Public Trustee Act.....	7

TABLE OF CASES

Ali Ganyuma v Ali Mohammed [1927 - 1928] 11 KLR 30	3
Gibbs v Roy 85 CLJ 280	53
.....	57
.....	82
Hadija v Iddi [1974] EA 50.....	53
Rawal v Mombasa Hardware Ltd. [1968] EA 392.....	98
.....	101
Re: Maangi [1968] 1 EA 637 (HCK)	47
Re Elizabeth Wensley (1882), 7 P.D. 13.....	53
.....	58
Income Tax v T [1974] EA 546.....	61
.....	70
In the Estate of A. B. Simpson, [1936] P. 40.....	53
.....	58
In the Goods of Knight, [1939] 3 All E.R. 928.	53
.....	59
In the Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000] LLR Number 100014 (HCK).....	73
In the Matter of the Estate of the late Simon Timaiyo Mokosio also known as Simon Nemokoosio (Deceased)	89
Kanti & Co. v British Traders Insurance Co., Ltd., High Court Civil Case No. 314 of 1962 (unreported).....	102
Kidede v Amin (H.C.C.C. No.83 of 1973).....	68
Khotodad v Bai Jerbhai (1938), 62 Bom. 64.....	53
Kuria v Shah (H.C.C.C. No. 122 of 1986)	69
Mandavia v Rattan Singh [1968] E.A. 148.....	53
.....	56
Ochola v Langat (H.C.C.C. No. 3081 of 1986)	68
Otieno v Ougo.....	69
Roman C Hintz v Mwangombe Mwakima (1988) 1 KAR 482.....	63
Secretary of State for Foreign Affairs v Charlesworth Pilling [1901] A.C. 373.....	53

.....	58
Said Bin Seif v Shariff Mohamed Shatry [1940], 19 K.L.R. 9.....	53
.....	58
Trouistik Union International and another v Jane Mbeyu and another CA/4590 (unreported).....	61
Virginia v Joash Ougo and another (1988) 1 KAR 1048	65

LIST OF ABBREVIATIONS

P & A	Probate and Administration
RM	Resident Magistrate
CJ	Chief Justice
HCK	High Court of Kenya
ACHPR	African Charter on Human and Peoples Rights
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Art.	Article

LIST OF TERMINOLOGIES

Ad Colligendum Collecting

Administration Pendente lite An administration granted during the pendency of a suit concerning the validity of a will. In other words, this is a grant given to a person appointed by the court simply to administer the estate during litigation. For instance if the will of the deceased is being contested the court may appoint a petitioner *pendente lite* to administer the estate so that it is not wasted. The holder has no power to distribute the estate and the grant is terminated upon conclusion of the pending proceedings.

Amicus Curiae Friend of the court; that is, a person who is not a party to a lawsuit but who petitions the court to file a brief in the action because that person has a strong interest in the subject matter.

Ex-parte Done or made at the instance and for the benefit of one party only, and without notice or to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usually for temporary or emergency relief.

Grant of letters of administration de bonis non This is granted where the personal representative has not completed the administration of the estate either because he has died or for some other reason has left part of the estate unadministered. A grant limited to the purpose of administering the administered part may be issued.

Grant ad litem It is a grant which enables the representative of the estate to sue on behalf of the estate, or defend a suit where the estate has been sued. In other words, these are special letters of administration authorizing a person to be a legal representative for the purposes of litigating in a suit on behalf of an estate of the deceased person.

Grant ad colligenda bona A temporary order for the administration of an estate of a deceased person used when the estate is of a perishable nature.

<i>Grant ad colligenda bona defuncti</i>	A grant that allows for collection and preservation of the estate of the deceased person where the estate consists of perishables, or assets which require quick action or attention. It is granted before a full grant can be awarded. It is applied for under rules 36 and 37 of the Probate and Administration Rules by any of the dependants who are eligible to inherit from the estate of the testator.
<i>Grantee pendente lite</i>	A person to whom a grant <i>pendente lite</i> has been conveyed.
<i>Suo-moto</i>	On a courts own motion

CHAPTER 1

INTRODUCTION

1.1 ORIGINS OF THE SUCCESSION ACT¹

It is important to first look at a brief history of the origins of the succession laws in Kenya and defects noted within the laws giving rise to current Law of Succession Act Cap. 160 Laws of Kenya.

During the colonial era the diverse people of Kenya had different laws applicable to them.

The laws were not uniform and were categorized into four systems of laws, including that used in the succession laws. The four systems being:

- (A) The succession laws under statute law.
- (B) The succession law under Hindu law.
- (C) The succession law under Islamic law.
- (D) The succession law under Customary law.

1.2(A) STATUTE LAW

The succession law under statute law that was applicable was the Indian Succession Act of 1865. This Act was restricted only to Europeans, Goans and Parsees. It dealt with administration of estate both testate and intestate. Another Indian Act was enacted known as the Probate and Administration of Estate Act of 1881 that dealt with the administration of estates but applied to other Asians. Both Acts, did not apply to Africans. This aspect will be referred to later below.

1.2(B) SUCCESSION LAW UNDER HINDU LAW

In 1870, the Hindu Wills Act was enacted to enable Hindus to make wills. This was applied together with the Probate and Administration Act of 1881. In 1946, the Hindu Succession Act (Cap. 158) was enacted to permit succession laws for Hindus to be regulated by Hindu laws.

1 Commission on the Law of Succession, 1967

1.2(C) SUCCESSION LAW UNDER ISLAMIC LAW

The Mohammed, Marriage, Divorce and Succession Act (Cap. 156) applied solely to those people who professed the Islamic faith. Thus, where a male marries and dies having been a Muslim, then his property and law of succession applicable would be governed under the “principles of Mohammedan law” or the law of that particular sect of Mohammedans the deceased may belong.

1.2(D) THE SUCCESSION LAW UNDER CUSTOMARY LAW

Under the Customary Law, it may be noted that the Kenya Colony Order in council of 1921 provided that in dealing with the African Customary Law, the High Court and all subordinates shall be guided by African Customary Law in civil matters to which Africans are parties. This meant that customary law only applied to Africans. The difficulty that arose, was that all customary laws were oral. Some case law on customary law was recorded on appeal to the court of review. Any disputes that arose on customary law would see opinions even from elders or oral evidence would guide the proceedings. It was not until ‘The Reinstatement of African Law on Kenya’ that customary law was finally documented. In 1961, the African Wills Act (Cap. 169) was enacted to enable the African write a will although it had its limitations. The procedure in implementing the will was left to the Africans’ tribal laws. What then was wanting or lacking in the laws of succession in Kenya prior to independence?

1.3 DEFECTS OF VARIOUS SUCCESSION LAWS

The law of succession deals with the distribution of a deceased person’s estate on his or her demise. The deceased person would have stated, before his death, how he wants his properties distributed amongst his heirs (testate) or he may not state anything (intestate) but allow the traditional customary laws to distribute his estate or the religious laws to govern such distribution. In the two latter cases, no written instruction is given.

The effect of this was to allow the various people to practice their respective values of law, thus bringing about various different laws applicable. It ran on racial lines and excluded certain groups of people to the access of rights that may be beneficial to others.

1.3(A) STATUTORY LAW

The Indian Succession Act of 1865 that applied only to Europeans, Goans, Parsees provided for the making of ones' will and the procedure in which such property would be distributed. It also relates to intestacy where one dies without making a will. This Act was amended in England on the aspect of intestacy but the Kenyan Act had not been amended. For instance, the 1865 Act gives unlimited freedom of power to a person to dispose, by will, his property to an outsider and thereby disinheriting completely, his or her dependants.

In England, they had in 1925 enacted the Administration of Estates Act (1925) and the Inheritance (Family Provisions) Act, 1938, later amended by the Intestates Estate Act, 1952. These amended Acts gave power to the English courts to vary, within defined limits, the will of a deceased person who may have in fact failed to make reasonable provision for the maintenance of their family. In Kenya none of the amended Acts were part of Kenya's (pre-independence) laws. The possibility of disinheriting a family was there and real.

1.3(B) THE HINDU LAW

Under the Hindu law, the laws of succession applicable are those of "any school or such, school of Hindu law" which is taken to mean the ancient Hindu laws. To remove any doubt, ascertaining of the law under the Act was to be 'left to the courts to decide "as it thinks fit", and on the "principles of justice, equity and good conscience". The Hindus Succession Act, 1956, had in fact not kept up with any modern changes made in India.

1.3(C) ISLAMIC LAWS

The Islamic Laws, administered through the Kadhis' courts saw the laws interwoven with marriage, divorce and succession laws. In essence, you are required to marry a Muslim who would then be eligible to inherit your estate. In practice, it was found that Muslim laws would be applied irrespective of the status of the marriage. There arose also the problem of non-Muslims not being permitted to inherit an estate of a Muslim as seen in the case law of *Ali Ganyuma v Ali Mohammed* [1927 - 1928] 11 KLR 30.

The deceased was of the wa-Digo tribe at the coast, Kenya. He converted into Islamic. Upon his death, a question arose as to which law should be applied. The Islamic law of inheritance or the wa-Digo customary law? The difference would be that under the Islamic Law of inheritance, it was patrilineal whilst under the wa-Digo the inheritance was matrilineal.

In the above case, the native tribunal ruled that the estate should use the wa-Digo customary law. On appeal to the Court of Appeal from the magistrates' court which upheld the native tribunals' findings, the court held otherwise and stated that the estate be governed by Mohammedan Law and thus it descends patrilineally. They relied on section 4 of the Mohammedan, Divorce and Succession Ordinance.

1.3(D) CUSTOMARY LAW

As to customary law, the biggest impediment was that the laws were unwritten. Where disputes arose and parties appear before a court of law, each party would always have to prove the facts and legality of the customary law to be applied. If customary law was written then the arbitrator or judicial officer merely required to read the provisions relating to a particular law. The law of succession applied to the very many different communities living in Kenya being the Europeans, Asians, Muslims and also applied to the various African tribes. Despite this, it was noted that in principle, the procedure of succession laws were similar.

It clearly came out in the findings of the Commission of inquiry that "the right of women whether wives or daughters, its share in the inheritance, are either very limited or non-existence." Inheritance laws under customary laws were patrilineal. The benefit would be properties handed down from father to son with little participation from women. It was also noted by the Commission that customary law catered for traditional property such as "land and cattle". How then do you apply customary law to "houses, modern furniture, registered land, bank accounts, or motor vehicles?"

Finally, the waning of African customary traditions and practices had brought about little safeguards to the rights of the beneficiaries

and or heirs. The Commission discovered that the fibre strength of elders had lost its meaning, power and hold on the people. More people ignored the advice of the elders and the moral ability to strengthen traditions became of no consequence. A person who is named as an administrator of an estate would not *parse*, follow traditions to safeguard the rights of the beneficiaries.

1.4 TASK OF THE COMMISSION

The Commission was faced with a task of recommending² “a uniform code of succession law which would apply to all persons in Kenya. They found themselves with three possibilities: ³

- a) to recommend that each community should be subject to its own law of succession...
- b) to recommend one unified law of succession to apply to all persons in Kenya to the total exclusion of religious or customary law.
- c) to recommend... a compromise... a uniform law of succession but allowing for the application of customary or religious law in certain circumstances and under certain conditions.

Where a person writes a will stating how he wishes his properties to be distributed, the procedure and administration of executing those wishes can easily be made uniform. The problem arises where a person has not written a will to state how his property should be distributed. If it is left to be laid down by customary laws this would mean that the *status quo* on distribution of estates remains. If a universal and unified application of succession law is recommended excluding religion and customary law, it would bring about a situation where some parts of the country would not be ready for this and would totally reject the new laws.

2 Terms of reference of the committee reads:

“to consider the existing law on Succession to property on death, the making and proving of wills and the administration of estates; to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, the Indian applied Acts and the relevant Acts of Parliament including those governing Muslim and Hindu succession; to prepare a draft of the new law in accordance with ‘the Commissioners’ recommendations.”

3 The Criminal Customary and Religious Laws were done away with and any useful laws included in the Penal Code. The other Act touching on Human Rights that has since been consolidated is the Children’s Act.

The Commission came up with a compromise recommendation,⁴ where a unified law of succession was recommended but with exceptions. The Commission rejected that exceptions should include the Islamic faith or on grounds of religion as this could be catered for easily through the making of wills. It nonetheless recognized areas where Kenyans would not be ready for it. They recommended the areas to be excluded until the people were ready for the universal application of intestacy laws. These areas were left for the minister to decide but they actually suggested: Turkana, Marsabit, North Eastern, East Pokot, Samburu and parts of Kajiado and Narok districts.

The effect that the Commission wished to bring out was that:
The universal law of intestacy would not apply to those types of property for which customary law of succession were demised.

The reason being that “the majority of inhabitants were unlikely to expect or even understand the new law of succession.” Yet what would you do with the businessman in a rural township who owned wealth that included modern property? A new law was required to govern such properties and to safeguard the interest of the beneficiaries.

1.4.1 Procedure where a person dies intestate or testate

Under the current Succession Act, in both testate and intestate situations, a legal representative would apply for a grant of letters of administration given to them and authorizing such persons to distribute the estate amongst the beneficiaries.

Where a will is written, it would name such person who is referred to as an executor (male) or executrix (female). Where no will has been written the person to apply for letters is referred to as the administrator⁵ (male) and administratrix (female). Such person is appointed by the court on application.⁶

4 Recommendation no. 1 pg. 18

“We recommend that there be enacted a new code of succession law replacing the existing laws, merit should apply uniformly to all persons in Kenya as regards the safety of testate succession administration of estates. We recommend further that there should be a uniform law of intestacy and administration of intestate estates that this should not apply to agricultural land of crops thereon and livestock situated in areas of Kenya to be specified from time to time by ministerial order.”

5 Jowitt's *Dictionary of English Law*, Earl Jowitt and Clifford Walsh, 2nd Ed. Vol. 1, London Sweet and Maxwell Ltd 1977. See also *Black's Law Dictionary*, Eighth Ed., Bryan A. Garner, Thomson West.

6 Legal Dictionary.

Where no legal representative comes forward to claim an estate, the public trustee (a department of the Kenya Government under the Attorney General's Chambers) would take over the conduct of the said estate.⁷

What procedures and rules should then apply is governed now by one Act as opposed to several different laws applying to different groups of people.⁸

The access to court on matters concerning the Law of Succession appears complex to many. This is not necessarily so. The aim and objectives of this book is to make available a simple explanation of the procedure of coming into court by not only the legal profession and the Judiciary, but by the laypersons, majority who tend to be families, women and children often left behind to deal with the estate of their departed loved ones.

The procedure and rules that apply under the Succession Laws in Kenya is now found under the one Act that governs all the people of Kenya, as opposed to several different laws applying to different groups of people. The Act is divided into three segments.

- i) The main section of the Act.
- ii) Schedules 1-9 excluding Schedules 4 and 8.
- iii) The Subsidiary Legislation:
 - a) Probate and Administration Rules
 - b) 1st Schedule – Forms (alphabetic index of forms)
 - c) 2nd Schedule – Table of Consanguinity
 - d) Table of fees.

This book will look in details into the Subsidiary Legislation of the Probate and Administration rules and the forms to be used for the purposes of accessing the courts and being heard.

7 Public Trustee Act

8 The Succession Act contains standard forms to be filled out by applicants. The access to court is easier and applies to all persons having died and owning property in Kenya.

CHAPTER 2

JURISDICTION

2.1 MAGISTRATES COURTS

Sections 47-50 of the Succession Act.

The High Court has unlimited jurisdiction.

Jurisdiction of Magistrates

- (i) Where appointed by the Chief Justice, Resident Magistrate may entertain applications other than revocation of grant
- (ii) Kadhi Courts to exercise jurisdiction over estates of Muslims.
- (iii) High Court to have exclusive jurisdiction to make a grant where both High Court and Resident Magistrate court exist.
- (iv) Territorial jurisdiction of Magistrates – Gross value of estate not to exceed Kshs. 100,000.

Appeal lies from Resident Magistrates' Court to High Court. Only a Muslim's estate can be appealed to the Court of Appeal on a point of law. This may be done with leave of the court.

APPLICABILITY OF CIVIL PROCEDURE ACT

- (i) Succession Act defines what rules of the Civil Procedure Act are applicable to succession matters.
- (ii) Orders 5, 11(rule 3(2)(d)) x three, 11(rule 3(1)(h)), 16, 19, 26, 45 and 50 rule 6 of the Civil Procedure Rules.
- (iii) These rules deal with service, interrogatories, discovery and inspection, consolidation of suits, attendance of witnesses, affidavits, security for costs, review and time.

Section 48 gives resident magistrates jurisdiction to deal with estates whose value does NOT exceed Ksh.100,000.

Where the magistrates court is situated and where there is also a High Court, it is only the High Court which will have jurisdiction to deal with Succession Cause.

a) Revocation of Grants

Where the application is for revocation of grant only the High Court has jurisdiction to hear such application. The magistrates' courts have no jurisdiction to deal with application for revocation of a grant.

b) Appointment of Magistrates

The Chief Justice appoints magistrates through notices in the Kenya Gazette for purposes of representing the High Court. A magistrate who has not been appointed by the Chief Justice to represent the High Court under section 47 is not permitted to deal with succession matters.

2.2 HIGH COURT

Section 47 gives the High Court jurisdiction to hear succession matters. The High Court has no jurisdiction to issue Limited Grant – *ad colligenda Bona* if such grants are not issued in Nairobi, Mombasa, Kisumu, Nakuru⁹, Nyeri¹⁰, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries¹¹.

9 LN 223/92

10 LN 266/95

11 LN 143/09

Note: -Limited grant used to be available *ad colligenda bona* in Nairobi, Kisumu, Nakuru, Nyeri. This has now been extended to most but not all High Courts in the country.

CHAPTER 3

TYPES OF GRANTS

There are different types of grants. This depends on the manner in which a person dies. When a person dies, his affairs which he may have left undone have to be done or administered. This means debts not paid have to be paid, moneys owed to the deceased are collected.

Some deceased persons would have written out their wishes as to how they would want their affairs to be conducted. Others would have not written anything. Others would not have done anything at all.

Where a person writes down his wishes as to how his property and affairs are to be handled, he is said to have died testate. Where no will is written, such a person is said to have died intestate.

The Act therefore provides for any person to apply for authority to deal with and handle the affairs of the deceased. Where a will has been written and person named, such person is referred to as an executor (male), executrix (female); where no will had been written such person is referred to as an administrator (male) and administratrix (female).

Depending on how the deceased died and left his affairs, different applications of grant have to be applied for. In order to understand this, I will state the different types of grants and in which situation they are granted.

- 3.1 Grant of Probate
- 3.2 Grant of Letters of Administration with will annexed
- 3.3 Grant of Probate or "Oral will"
- 3.4 Grant of letters of administration Intestate.
- 3.5 Resealing of Grant of Probate or Grant's letters of administration.
- 3.6. Limited Grant
- 3.7 Grant for special purposes:
 - a) Limited
 - b) Administration *Pendete Lite*
 - c) *De bonis non*

3.1 GRANT OF PROBATE

- a) The deceased died having written a will and named the person to be in charge of his affairs (executrix/executor). The said person named is to apply for the grant of probate unless he refuses or declines to do so.

- b) **Forms**

The executor files Form P & A. 78 (petition) (*see page 175*), Form P & A 3 (affidavit) (*see page 99*), the original will plus 2 photocopies of the will and the original death certificate.

- c) **Procedure**

If all documents are in order the file is placed before the Honourable Judge by the Deputy Registrar.

It is given orders to have the matters advertised in the Kenya Gazette. If no objections are raised before 30 days, letters of grant of probate are issued.

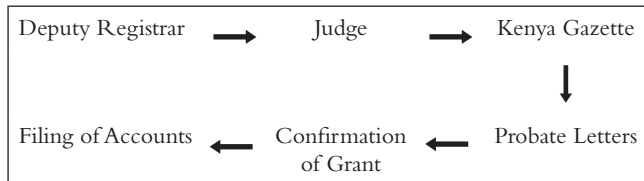
Grant issued by Court. P & A 45 (*see page 151*)

In such letters the copy of the will is attached. The grant of letters would have three copies of the will attached duly sealed with ribbons.

After a period of 6 months the parties come in to confirm the said grant.

Any accounts should be filed within 6 months after the confirmation of grant.

A party may apply for confirmation of grant within 3 months.



3.2 GRANT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED

- a) This is where a person who dies leaves behind his will but has not named the person who should handle his affairs. Any beneficiary can apply for Grant of Letters of administration with Will attached.

b) **Forms**

The executor files Form P & A 79 (petition) (*see page 177*) and P & A 3 (affidavit) (*see page 99*) an original will, two photocopies of the will, a death certificate.

c) **Procedure**

The same is followed as 3.1 (c) above.

Grant issued by Court. P & A 43 (*see page 147*)

3.3 GRANT OF PROBATE OF PROOF OF ORAL WILL

Where a person, under customary law gives an oral will and dies within three months, the beneficiary can apply for Grant of Probate of proof of oral will.

Grant issued by Court. P & A 44 (*see page 149*)

3.4 GRANT OF LETTERS OF ADMINISTRATION INTESTATE

- a) This is where a person dies having not written a will or given instructions as to what should occur to his estate/or property. Any person may apply for grant of letters of administration intestate. This though, must first be applied for by a person who is a survivor and in the order of consanguinity (i.e. wife, husband, children, parents etc.).

b) Forms

- i) In a general situation the following forms should be filed:
 - P & A 80 (petition) (*see page 179*)
 - P & A 5 (affidavit) (*see page 101*)
 - P & A 12 (affidavit of means) (*see page 113*)
 - P & A 11 (affidavit of justification of proposed sureties) (*see page 111*)
 - P & A 57 (guarantee of personal sureties) (*see page 155*)
 - Death certificate (mandatory).
- ii) Widow or a widower – adult children as survivors.
Where the applicant is a widow with adult children, the following forms are filed:
 - P & A 80 (petition) (*see page 179*)
 - P & A 5 (affidavit) (*see page 101*)
 - P & A 12 (affidavit of means) (*see page 113*)
 - Death certificate
 - The adult children are required to give consent to the widow/widower to apply for the grant.¹³
- iii) Widow/widower with minor children as survivors
Where the applicant is a widow/widower with minor children as survivors, the forms filled are:
 - P & A 80 (petition)
 - P & A5 (affidavit)
 - P & A 12 (affidavit of means)
 - P & A 11 (affidavit of justification of proposed suits) (*see page 111*)
 - P & A 57 (guarantee of personal sureties) (*see page 155*)
 - Death certificate (mandatory)

c) Procedure

This is the same as in the number 3.4(b)(i) above dealing with a general situation. The difference is that there must be two persons to apply for the grant. This is because there is created a trust as a result of the death of the spouse. This trust is known as a continuing trust (See Section 58).

Section 84 deals with continuing trust where there is a life interest.

¹³ (P & A 38) (*see page 143*) is the form filed as to consent)

In applying for grant of letters of administration intestate the total number of persons to apply is four, (see section 56(1)(b) being grant made in respect of the same property). Nonetheless where an affidavit has to be sworn, it is sworn by any of the four (rule 7(8)).

Grant issued by Court. P & A 41 (*see page 145*)

3.5 RESEALING (RULE 42(2))

- a) Where a foreigner dies abroad but has property in Kenya, a grant is applied in his country. It is then brought to the High Court of Kenya for resealing. This means the foreign grant is filed and normal procedure of gazettelement takes place.

Where a Kenyan dies abroad, his domicile determines where he should apply for the grant. If he generally resides in Kenya but dies abroad then the grant would apply in Kenya.

The Commonwealth countries allow application in any of its countries.

- b) **Forms**

P & A 81 or P & A 82 (petition) (*see page 181 and page 183*)

P & A 7 (affidavit) (*see page 103*)

Certified copy of the grant issued by foreign country.

- c) **Procedure**

The grant from the foreign country is filed. The file is minuted, to the Hon. Judge. The notice to the Kenya Gazette is issued. If there are no objections within the 30 days notice, then a resealed grant is issued by the High Court of Kenya. A grant given by the High Court can be used in the foreign courts for resealing. \

Grant issued by Court. P & A 81 (*see page 181*)

Jurisdiction only lies with the High Court of Kenya at Nairobi and Mombasa to issue this type of grant.



3.6 LIMITED GRANT (*Grant ad colligenda bona*)

- a) In order to ensure that an estate does not go to waste or that there is a pending case required to be administered an applicant can apply for Limited Grant. This is actually known by the words:

Grant of administration *ad colligenda bona defuncti*.

Under section 67, rule 36.

(Note this is different from rule 14, 5th Schedule where grant is limited to filing suit only. (see below)).

The grants can only be applied for and made in the High Courts of Kenya, as stated: Nairobi, Mombasa, Nakuru, Kisumu, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret, and Bungoma registries.

b) **Forms**

P & A 85 (petition) (*see page 185*)

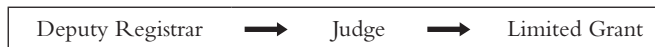
P & A 19 (affidavit) (*see page 131*)

Copy of death certificate (where signature endorsed by the applicant is required).

c) **Procedure**

The Deputy Registrar after confirming the papers are in order, places the file before the Honourable Judge who gives orders accordingly. The Limited Grant is thereafter issued.

No parties ever appear before the judge. No advertisement is required, although this may be debatable. Grant issued by Court. P & A 47 (*see page 153*). A party must apply for a full grant in order to divide and dispose of the deceased's assets.



3.7 GRANT FOR SPECIAL PURPOSES

Grants can be issued for special purposes.

These grants are as follows:

- 1) Probate Limited to purposes specified
- 2) Administrator *Pendete lite*
- 3) Grant of letters *de bonis non*

3.7.1 Probate Limited for purposes specified in the will. Rule 11 of 5th Schedule

Where will specifies that the probate shall be for the purposes specified, a grant is issued limited only to that which is specified.

Where a person wishes to sue on behalf of the estate, that person can be issued with a grant limited to representing the deceased in a suit. (See paragraphs 14 and 15 of Schedule 5). *Grant ad litim*. P & A 90B (LN 39/02)

Where a person wishes to apply for school fees, P & A 85A chapter 5, paragraph 18, petition for special limited grant P & A 85.

A person not normally entitled to the grant may be appointed whether limited or otherwise.

3.7.2 Administration pendente lite schedule 5 rule 10

Where parties are disputing over the estate, the estate in the meantime should not be left unadministered.

To ensure the estate is not wasted, the courts can appoint any person or general administrator (i.e. The Public Trustee) to administer the estate whilst the dispute proceeds. This is known as Administration *pendente lite*. No division or apportionment of properties is to be done during this time. Forms issued by Court. P & A 90 (see page 189)

3.7.3 Grant of letters of administration de Bonis non or Probate at rest 5th Schedule paragraph 16, rules 7,12 de Bonis non; 5th Schedule paragraph 17, 19 and 20

Where the executor/executrix or administrator/administrix dies, then another person can apply to take over the grant. They would apply for letters of administration *de bonis non* for purpose of completing the estate.

There is no need for such a person to hold letters of administration for the former administrator or executor.

This is not a substitution under the Civil Procedure Rules but under the Succession Act. No letter of grant is taken out for the former executor/administrator to administer the current grant. Forms issued by Court. (P & A 86) (*see page 187*)

CHAPTER 4

DEATH CERTIFICATE

In each application for letters of grant, there must be a death certificate.

The Consolidated Practise Rules undated issued by the Law Society from the courts to them states:-

“F 1.....

2. Death certificate

A death certificate must accompany any application for probate or letters of administration.

- a) If the application is not made by an advocate; and
- b) If the death took place outside Kenya”.

(Section 118 presumption of death must be made formally in the civil courts for the Registrar of death to issue certificate.)

Section 118 of the Evidence Act states:

118. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

CHAPTER 5

WHO IS ENTITLED TO A GRANT?

The persons who are entitled to apply for a grant are:

- i) Persons who have been appointed in a will as executors.
- ii) Persons who are NOT a minor, of unsound mind or bankrupt.
- iii) Any person can apply for a grant but priority is given to spouses, children, parents according to the degree of consanguinity. Not more than 4 people may apply at once. Rule 7 (1)(e) 2nd Schedule of the rules. Table of consanguinity (*see page 245 and 246*)

THE NUMBER TO APPLY

- (i) For grant of letter of administration intestate there must be a maximum of four persons to apply. (See section 56(1)(b))
- (ii) Where affidavits are to be sworn, it may be so done by any of the four (rule 7(8)).
- (iii) Order 19 rule 5 Civil Procedure Rules does not also permit the swearing of an affidavit by two persons.

CHAPTER 6

CITATIONS

RULES 21,22 AND 23

- a) What happens if the person entitled to apply for the grant fails to do so?

Any applicant may apply for the grant. He does this by drawing a citation signed by the Registrar and supported by an affidavit.

- b) **Forms**

- i) Where there is a will - P & A 31 (*see page 135*)
- ii) Where there is no will- P & A 32 (*see page 137*)
- iii) Creditors P & A 36. (*see page 139*)

- c) **Procedure**

Service of the citation is done on the citor. The method of service is as directed by the Registrar.

It requires that the person cited to appear within 15 days of service. The citor is to be served with a copy of the form with the seal.

If the time given to the citee to appear has expired and the person cited has not entered appearance the citor may petition the court that the grant be made to herself. Alternatively, summons to be taken out or notices to persons cited be made or orders requiring such persons to take out the grant or the grant be taken out by others.

Proof of service is required. Once this has been granted, letters of administration are applied in the normal way.

- d) **Purchaser**

A good example of a citation is that of a purchaser.

The public trustee has prior rights to the estate over a creditor. The creditor/purchaser has to ask the consent of the Public Trustee to apply for the letters. If granted, a purchaser or creditor may prove that the estate owes him money by attaching a sale agreement. He can apply for letters of administration by way of first serving citations to all the beneficiaries where none are willing to take out letters of administration.

CHAPTER 7

OBJECTIONS

SECTIONS 68 AND 69(1)

All the grants once applied for must be advertised in the Kenya Gazette. This means that notice is given to the members of public that a grant is being made.

After a lapse of 30 days if no objections are raised, letters can be issued.

If an objection is made within the 30 days of advertisement then, the procedure to use is as follows:

An objection is filed in triplicate in the court. The objection is entered into a register (for objections) by the Registrar. (rule 17(1)).

The Registrar then sends a notification Form P & A 61 (*see page 157*) to the applicants, alternatively he may send a copy of the objection by post (rule 17(4)).

The Registrar will also send Form 67 (*see page 163*) to the objector requiring him to file an answer to the petition by way of cross-application together with the supporting affidavit. (rule 17(5)).

SUMMARY

1. Publication in the Kenya Gazette of the grant.
2. Objection filed within 30 days.
3.
 - a) Registrar gives petitioner Form 61 notifying him of objections, and registers in a register for objection (see rule 17(12))
 - b) Registrar gives the objector Form 67 notifying him to file an answer to the petitioner by way of cross application and replying affidavit.

Once all the papers have been filed, it is the Registrar who refers the matters to court for directions. The directions is done by the judge as to who is entitled to start during the trial.

It is the Registrar who will notify both parties (petitioner and objector) of the time and place set for hearing of the petition answer and cross application.

Objections may be withdrawn by way of a notice to withdraw P & A 64 rule 17 (9). (*See page 161*).

An objector may amend his objections by lodging amended answer and cross-application. A copy is required to be served on the petitioner.

The dispute is determined (see section 69(2)).

If no objections has been filed the answer and cross-petition the court may proceed as if no objections had been raised (see sections 68 and 69(1), 70 and 71).

CHAPTER 8

CONFIRMATION

8.1 AFTER 6 MONTHS HAVE EXPIRED

- a) The grant may be confirmed if there is no objection pending.
(rule 40(1).

b) **Forms**

- i) Where a grant has been issued for a will.
Form 108 (application) (*see page 213*)
Form 8 (affidavit) (*see page 105*)
- ii) Where a grant has been issued for letters of administration with will annexed.
Form 108 (application)
Form 8 (affidavit)
- iii) Where a grant has been issued for letters of administration intestate.
Form 108 (application)
Form 9 (affidavit) (*see page 107*)
- iv) Where confirmation is required within 6 months under s.71(3) of the act.
Form 109 (Application) (*see page 215*)
Form 8 or 9 (Affidavit) or whichever is applicable

The difference in the forms for letters of administration is that the said forms must disclose the appointment of each survivor who is entitled to the said estate.

All the list of beneficiaries must be disclosed. See rule 40 (3)(a)(b)(4) of the Probate and Administration Rules.

c) **Procedure**

Once the application has been filed as per above forms respectively, a date is taken in the registry and the applicant appears before the Honourable Judge.

Form 37, (*see page 141*) consent to the confirmation of grant may be filed in certain cases. This form would dispense with the attendance of all parties who are entitled to the estate.

The Honourable Judge being satisfied with the application would duly confirm the grant.

8.2 PROTEST

RULE 15, RULE 40

If a person wants to be informed when a grant is to be confirmed, he should file a caveat (see rule 15(1). Form P & A 28.) (*see page 133*)

This would then be recorded in a book/register. On the day the matter comes up for confirmation of the grant then the Registrar at once notifies the applicant (Form P & A 111) (*See page 219*) warning him of the making of the caveat. He then asks the applicant to file Form 10 if he wishes to object to the confirming of the grant.

If Form 10 (*see page 109*) is not filed, the grant is confirmed on receiving P & A 37 – consent of all parties. (*see page 141*)

If form P & A 10 is filed, then the court would order directions to be taken in chambers on notice Form 74 (*see page 173*) to the applicant.

In a magistrates court, the direction would be to place the matter before the High Court to determine on its behalf. At the time of hearing the application for confirmation would be read to the parties. The protest would also be read to the parties.

If satisfied, the grant may be confirmed. If not the High Court would hear the full evidence of the parties.

CHAPTER 9

REVOCATION

SECTION 76 R 44

- a) After a grant has been confirmed, no objections to it may be filed or protested. The parties have only one option and that is to seek revocation of the said grant (See exceptions below).

b) **Forms**

P & A 107 (Application) (*see page 211*)

P&A 14 (Affidavit) (*see page 117*)

c) **Procedure**

- i) An applicant would file form P & A 107 and P & A 14 in the High Court, in the Succession case itself. Where the file is in the subordinate court a miscellaneous application is filed; but a succession file would actually be opened in the High Court.

Immediately on receipt of this application the Registrar issues Form P & A 70 (*see page 169*) to the applicant (seeking the revocation) which notifies him of when he would attend to the judge. This is done *ex-parte*.

Once the date is given, the applicant appears before the judge *ex parte* for directions. The judge would then direct which persons should be served with the application.¹⁴ The persons would normally be those who may be affected by the revocation.

The Honourable Judge must also state the mode of service i.e. personal service or service other than personal including the manner of effecting such service.

The applicant is to then serve, on the persons named, Form 107 & 14 and a notice under Form 68 (*see page 165*)

Each person so served may file an affidavit stating whether they support or oppose the application and the grounds for so doing.

Once all the affidavits have been filed, the Registrar

14 (Form 107 & 14) (*see page 211 and page 117*)

gives notice to all concerned to appear before the High Court for hearing.

The court may either proceed to determine the application or make such orders as it deems fit.

ii) Courts Own motion (*Suo Moto*)

The court may also of its own motion revoke a grant (see rule 44(5)).

Where it does so, it must give a notice in Form 69 (*see page 167*) and serve on persons concerned.

The reasons as to why there should be revocation is outlined in section 76 namely:

- a) Proceedings obtained were defective in substance.
- b) Grant obtained fraudulently.
- c) Grant obtained by means of untrue allegation of fact.
- d) Person whom grant was made has failed to apply for confirmation of grant within one year;
or to proceed diligently with the administration;
or has failed to produce the inventory or accounts of the administration; of grant as required under section 38(e)(g).

CHAPTER 10

RENOUNCIATION

RULE 18

- a)* All the survivors must be notified of the probate.
Whether the estate is intestate or testate, the survivor may wish to renounce the estate.
- b)* **Forms**
Forms 98 to 102 (*see page 195 to page 203*)
- c)* **Procedure**
Once a renunciation has been filed the person having so renounced is NOT permitted to retract.
An executor is allowed to renounce his rights to administer the estate.

CHAPTER 11

RECTIFICATION OF GRANT

RULE 14(1)

- (1) On application for a grant and before a grant is issued rule 14(1) to apply.

Procedure

Notice under P & A 62 (*see page 159*) (no affidavit required) is filed in the Original application file.

Where there are objectors, notice to be served on objectors.

Where there are none or the amendment is minor, Registrar may permit the amendment without notice to any party.

- (2) Where a grant has been issued with or without a confirmed grant. Section 74 and rule 43 apply.

Procedure

The applicant is to file Form P & A 110 (*see page 217*) for summons for rectification of grant together with an affidavit or Form P & A 13 (*see page 115*) (unless exempted by the Registrar).

The application is placed before the court without delay. The court makes orders as to the rectification of grant. However, the court may direct that a notice to the parties including the applicant be issued that they attend before the court on the said application.

The procedure in both cases i.e. whether under rule 14(1) are administratively in the first instance.

CHAPTER 12

APPLICATION UNDER SPECIAL PROVISIONS OF THE ACT

The act envisages applications to be made in certain circumstances and as such provides for special provisions for this to be made.

This is:

- i. Where a person claims he or she is a dependant but was not provided for adequately or otherwise by will or instances. Section 26 rule 45.
- ii. Where an applicant had been given a gift in contemplation of death. Section 26 rule 45.
- iii. Where a child to the deceased who died intestate questions the appointment of his/her share as being unreasonably exercised or withheld. Section 35(3) rule 41.
- iv. Where a discovery of a cordial is found after grant of probate has been finalized and issued in case of a will . Section 61(1) Rule 6, Section 61(2) rule 48.
- v. Or where any other application under the special provision not otherwise provided for.

The above will now be looked at individually.

12.1 Dependant – section 26 rule 45

A person not adequately provided for by will or who is a dependant on in testacy

Definition: (Section 29)

Who is a dependant?

- Wife, wives former or wives and the children of deceased whether or not maintained by the deceased immediately prior to his death.
- Deceased's parents, stepparents, grandparents.
- Grandchildren, stepchildren, children whom the deceased had taken into his family as his own.
- Brother, sisters and half-brothers half-sisters as were being

- maintained by the deceased immediately prior to his death.
- Where the deceased was a woman, her husband, if she was being maintained by him immediately prior to the date of death.

12.2 Status of grant

- I.
 - a) Where grant applied for or made but grant not confirmed
 - b) **Forms**
P & A 106 (summons) (*see page 209*)
P & A 15 (affidavit) (*see page 121*)
 - c) **Procedure**
 - (i) Application filed in the original pending file with copies.
 - (ii) Application served upon personal representative of deceased (administration/tix), executor/trix by process server paid by the applicant.
 - (iii) Hearing
See procedure below.
- II.
 - a) Where grant has not been applied for/or and no file exists in court.
 - b) **Form**
P & A 96 (petition) (*see page 191*)
P & A 16 (affidavit) (*see page 125*)
 - c) **Procedure**
Petition and affidavit filed in the registry with copies. File is opened, copies of the application are served upon a person who appears to be entitled to apply for a grant under the Act and copies of proceedings served if any.
 - a. Hearing
See procedure below
 - b. Affidavit
Affidavit under P & A 15 and P & A 16 must contain the following information and particulars:
 - (i) Date of death of deceased
 - (ii) Relationship to deceased
 - (iii) Name, address of every other dependant at time of deceased's death.
 - (iv) If a gift was made in contemplation of death (section 31).

- (v) Whether a grant has been issued and if so to whom and date.
- (vi) Nature and value of deceased's property.
- (vii) Capital or income past, present, and future.
- (viii) Existing and future means and needs of applicant.
- (ix) If there has been other gifts made besides during life-time or deceased.
- (x) Conduct of applicant in relation to deceased.
- (xi) Situation and circumstances of other dependants and beneficiaries under any rule.
- (xii) General circumstances of case are – where deceased, the reasons for not making provision applicant.

d) *Hearing*

Application set down for hearing upon notice to applicant, persons served with proceedings and to such other person as the court directs.

Court to have regard to information and particulars referred to evidence may be adduced as to conduct of applicant in relation to deceased.

12.3 Child to deceased who died intestate - Section 35(3)

- a)** Property devolving upon a child/children shall be held in trust in equal share.

A child who questions through a trustee, if a minor, the appointment of his or her shares as being unreasonably exercised or withheld.

b) *Forms*

P & A 105 (summons) (*see page 207*)

P & A 17 (affidavit) (*see page 127*)

The summons shall pray for the appointment of such share of the state, whilst the affidavit is to verify this.

The affidavit (Form 17) is to set out particulars:

- a) Whether the deceased has been married more than once under any system permitting polygamy.
- b) Name of each spouse whom the deceased survived whether living or not.
- c) Whether the spouse has remarried

- d) Affidavit to state the nature, situation and nature of net estate.
- e) Deceased's property house where applicant belongs.
- f) Whether any valid appointment of the estate has been made under section 35(2).
- g) Particulars of the existing and future needs of the applicant.
- h) Past, present and future capital income from any source.
- i) Whether the deceased had made any advancement or other gifts during his lifetime or by will.
- j) The situation and circumstance of any other person who has any interest in the late's estates.
- k) The general circumstances of the case.

c) *Procedure*

Application filed in a succession cause where grant was confirmed, with copies served upon surviving spouse and children or other person as directed.

d) *Hearing*

The court hears the application. The court may direct notice be given to other persons or additional information be made available or make such order as the court may consider proper to determine their application.

12.4 Discovery of Codicil after Grant of Probate for a Will is proved– Section 61(1) Rule 47

That is, the executor named, is the same person in the codicil.

Codicil

Means a testamentary instrument made in relation to a will explaining, altering or adding to its dispositions as on appointments, and only made and executed as required by the provisions of this act for the making and execution of a will.

Procedure

Application filed in the registry in the original file where grant was made. Affidavit of applicant identifies codicil, must state, as far as possible, reasons why codicil was not submitted for proof.

12.5 Discovery of Codicil after Grant of Probate for letters of Administration with Will attached- Section 75 Rule 47 (i.e no executor named)

a) Procedure

Application filed in the registry within the original file where grant issued.

Note

If applicant is not the person to whom grant was made, a copy of the application i.e summons and the codicil and every supporting affidavit shall be served upon every such person if living not less than 21 days before the hearing of the application. All such persons served shall be named as respondents.

Further affidavit as is necessary may be filed by applicant and every respondent.

12.6 Discovery of Codicil after Grant of Probate for a Will has been proved- Section 61(2) Rule 48(1)

- a) (Section 61(2) Rule 48) where the executor appointed in the codicil is different from the main will the grant of probate shall be revoked.

Procedure to revoke grant:

b) Form

P & A 97 (application) (*see page 193*)

P & A 14A (affidavit) (*see page 119*)

Attach the old grant of probate and the new codicil discovered.

c) Procedure

New codicil lodged with a petition in the same will where the grant of probate was issued.

Executors

All the first executors who had been granted the probate are named as respondents and served with petitioner and affidavit not less than 21 days of hearing.

No Executors

Where there are no executors and non can be found for purpose of being served. Applicant shall apply in Form 70A (*see page 171*) for

directions as to service of petition and supporting affidavit.

Court may require parties to file further affidavit if necessary.

12.7 Where no provision is provided for application – Section 49

A person who wishes to make application relating to estate but no provisions provided shall file summons supported by an affidavit.

CHAPTER 13

APPEALS

There lies an appeal from the Lower Court to the High Court. This is filed in the same manner as in normal appeals.

SECTION 50

“An appeal shall be to the High Court in respect of any order of decree made by a magistrate in respect of any estate and the decision of the High Court Orders shall be final.”

Only a Muslim's estate can be appealed to the Court of Appeal on a point of law. This may be done with leave of the court. (see section 50 LN 21/90).

CHAPTER 14

PUBLIC TRUSTEE

A situation arises where there is no one to administer the estate of the deceased.

Such estates are taken over by the Department of the Public Trustee. They then apply for a grant on expiring of such notice in the Kenya Gazette.

Namely, after an estate has remained unadministered for six months the public trustee has a right to take over the said estate.

The public trustee is exempted from applying for two administrators where there is a continuing trust under section 58. Namely, where minors are involved two administrators are not required.

In applying for a grant the Public Trustee is to follow the same procedure as prescribed in the Act for other litigants.

INDEX

Re Maangi

[1968] 1 EA 637 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 1 October 1968

Case Number: 161/1965 (117/68)

Before: Farrell J

Sourced by: LawAfrica

- [1] Constitutional Law – Discriminatory legislation – Grant of letters of administration to an African widow – Indian Acts (Amendment) Act (Cap. 2 1948 Revision), section 9; Constitution of Kenya (Amendment) Act 1964, s. 14 (1); Constitution of Kenya, section 26(1)(3) and (4) (K.).
- [2] Probate and Administration – African administratrix – Grant of letters of administration to African widow – Indian Acts (Amendment) Act (Cap. 2 1948, Revision), section 9; Constitution of Kenya (Amendment) Act No. 28 of 1964, section 14(1) – Constitution of Kenya, section 26 K.).

EDITOR’S SUMMARY

The applicant, an African widow, applied for the grant of letters of administration over the estate of her deceased husband. Previously it had not been the practice of the High Court of Kenya to grant letters of administration to Africans because of the interpretation of section 9 of the Indian Acts (Amendment) Act, which provides that all Indian Acts shall apply to Africans only so far as they relate to certain specified matters. The matters specified clearly do not include probate and administration. The argument put forward by the applicant was that section 9 of the Indian Acts (Amendment) Act was a discriminatory provision within the meaning of section 26(1) and (3) of the Constitution of Kenya, and was not saved by the provision in section 26(4)(b) as being a matter of personal law. Counsel submitted that, although the devolution of property was a matter of personal law, the appointment of administrators was a matter of general law.

HELD –

- (i) section 9 of the Indian Acts (Amendment) Act, in-so-far as it had the effect of precluding the application of the Indian Probate and Administration Act to Africans was a discriminatory provision;
- (ii) the provision in section 9 must therefore be construed as if the Probate and Administration Act was mentioned as a specific enactment in section 9(2) as applying to Africans.

Application allowed.

No cases referred to in judgment

Refer to page 638 of [1968] 1 EA 637 (HCK)

JUDGMENT

FARRELL J: This is an application for the grant of letters of administration to the widow, an African, of a deceased African inspector of police. The application involves an important question of principle, since hitherto it has not been the practice to make such grants to Africans. The existing practice stems from a provision in the Indian Acts (Amendments) Act which appears as Cap. 2 of the Revised Edition of the Laws of Kenya, 1948. Section 9 of that Act deals with the application of Indian law to Africans. Sub-section (1) reads as follows:

“(1) The provisions of all Indian Acts already applied or hereafter to be applied in (the Colony) shall apply to Africans to the extent herein provided or as may be expressly declared by (Ordinance) but not otherwise”.

Sub-section (2) lists certain enactments as extended to Africans. It is sufficient to mention that the Indian Probate and Administration Act, 1881, is not so listed. Then sub-section (3) provides as follows:

“(3) The provisions of all other applied Indian Acts shall extend to Africans in so far as they refer to the following matters:

The protection of life and property.

The maintenance of order.

The collection and payment of revenue fees or charges either generally or locally. Railways and tramways.”

It has never been suggested that sub-section (3) has any relevance

to the Probate and Administration Act, and the effect of the section read as a whole has been to exclude the application of the Act in question to Africans, and to prevent the grant to Africans of probate or letters of administration.

The Indian Acts (Amendment) Act has not been included in the 1962 Revision of the Laws, but it has not been repealed and remains of full force except in-so-far as its provisions may have been modified by the Kenya Independence Order in Council 1963, and the Constitution of Kenya established thereunder.

The present application was in the first place brought before the court by originating summons in Civil Case No. 1015 of 1964 (O.S.). Those proceedings were in fact irregular, the proper procedure being by petition, but before the irregularity was noticed, the issues which arise were fully argued by counsel for the applicant, and by Mr. Potter, Q.C., on behalf of the Attorney-General, who appeared as *amicus curiae* with Mr. Kivuitu. Before dismissing that application on grounds of irregularity I undertook that if a petition were presented in proper form, the court would be guided by the arguments put forward at the hearing of the summons in deciding whether the petition could properly be granted. This has now been done, and I have to decide whether there is any longer any legal obstacle to the grant of letters of administration to an African.

The Indian Acts (Amendment) Act is, for the purposes of the Constitution of Kenya (Amendment) Act, 1964 (No. 28 of 1964), an existing law. Section 14(1) of that Act reads as follows:

“Subject to the provisions of this Act, the existing laws shall, notwithstanding the constitutional changes, continue in force as from December 12, 1964 as if they had been made in pursuance of the amended Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the amended Constitution.”

Refer to page 639 of [1968] 1 EA 637 (HCK)

Section 26 of the Constitution – and this section has not been

amended in any material respect – provides in sub-section (1) as follows:

“(1) Subject to the provisions of sub-sections (4), (5) and (8) of this section no law shall make any provision that is discriminatory of itself or in its effect.”

The meaning of “discriminatory” is defined in sub-section (3) as follows:

“(3) In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

Subsection (4) so far as it may be material reads as follows:

“(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –

....

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; . . .”

There is nothing in sub-sections (5) and (8) which need be considered in the present context.

It is agreed by both counsel who appeared before me on the originating summons that section 9 of the Indian Acts (Amendment) Act is discriminatory within the meaning of section 26(3) of the Constitution, and I do not think I need say more than that I agree with their views, and accept that the section (so far at any rate as it effects the application to Africans of the Indian Probate and Administration Act) is discriminatory. It might, however, be thought that the provision made by the section fell within sub-section (4)(b) as being one with respect to the devolution of property on death or some other matter of personal law, in which case it would be unaffected by sub-section (1). Both counsel have considered this point and have agreed that the matter is not one of personal law: Mr.

Bhandari on the ground that the Indian Probate and Administration Act is procedural and does not deal with devolution of property, and Mr. Potter on the similar ground that whereas devolution of property is a matter of personal law and determines who are to be the beneficiaries, the transmission of property is a matter of the general law, and the appointment of administrators is part of the machinery under the general law for the transmission of the property of the deceased. I agree with these submissions and hold that there is nothing in sub-section (4) which prevents the application of sub-section (1) of section 26 of the Constitution to the provision of law under consideration.

I accordingly hold that section 9 of the Indian Acts (Amendment) Act, in-so-far as it has the effect of precluding the application of the Indian Probate and Administration Act to Africans, is discriminatory and that in accordance with section 14(1) of the Constitution of Kenya (Amendment) Act, 1964, the provision must be construed as if the Indian Probate and Administration Act were mentioned in sub-section (2) of the section, or with such other modification as would have the same effect. So far as the present application is concerned, I direct that letters of administration intestate shall issue to the applicant as prayed.

Application allowed.

For the applicant:

MK Bhandari instructed by Bhandari and Bhandari, Nairobi

For Respondent:

KD Potter, QC (Special Legal and Constitutional Adviser, Kenya), SM Kivuitu (State Counsel, Kenya) instructed by the Attorney General of Kenya as *amicus curiae*.

Hadija v Iddi

[1974] 1 EA 50

Division: High Court of Kenya at Mombasa

Date of judgment: 25 October 1973

Case Number: 85/1972 (19/74)

Before: Sir Dermot Sheridan J

Probate and Administration – Limited grant – For purpose of action against deceased – Grant may be made when no suit pending – Indian Succession Act, 1865, section 222.

The defendant was appointed the personal representative of a deceased driver against whom a claim was to be made.

The plaintiff filed suit praying that the issue of letters of administration be set aside, and argued that representation might be granted only when there was a pending suit.

The defendant contended that the section applied both where a suit was pending and also when one was to be filed.

Held:—an appointment may be made even when there is no suit pending (*Gibbs v Roy* (7) followed).

Case dismissed.

Cases referred to:

- (1) *In re Elizabeth Wensley* (1882), 7 P.D. 13.
- (2) *Secretary of State for Foreign Affairs v Charlesworth, Pilling*, [1901] AC 373.
- (3) *In the Estate of A. B. Simpson*, [1936] P. 40.
- (4) *Khotodad v Bai Jerbhai* (1938), 62 Bom. 64.
- (5) *In the goods of Knight*, [1939] 3 All ER 928.
- (6) *Said Bin Seif v Shariff Mohamed Shatry* [1940], 19 KLR 9.
- (7) *Gibbs v Roy*, 85 C.L.J. 280.
- (8) *Mandavia v Rattan Singh*, [1968] EA 148.

H.A.T. Anjarwalla for the plaintiff.

I.T. Inamdar and P.S. Talati for the defendant.

SIR DERMOT SHERIDAN, J.: On 7 January 1972 Krishnalal Lialadhar Ved and Damyanti Krishnalal Ved petitioned the court under section 222 of the Indian Succession Act, 1865 (hereinafter referred to as “the Act”) for the issue of letters of administration to their nominee, Addi Bin Ramdhani, the defendant in the present suit, to represent the estate of John Ovino Ohulu, deceased, limited to the purpose of being made a party to the suits which they proposed to institute in this court for the recovery of special and general damages for injuries sustained by them in an accident on 13 January 1969 on the Nairobi-Mombasa road which they allege were caused by the negligent and reckless driving by the deceased. The petition went on to recite:

- (1) on 10 April 1971 the deceased died at Mombasa, intestate, leaving a widow, the present plaintiff, as his heir and the only person entitled to take representation to his estate;
- (2) the deceased was unemployed prior to his death and left no assets;
- (3) the widow had expressed her unwillingness to act and had refused to apply for and obtain a grant of Letters of Administration to represent the deceased. Her memorandum of renunciation was annexed to the petition.

Page 51 of [1974] 1 EA 50

The petition was accompanied by a chamber summons under rule 3(1) of The High Court (Practice and Procedure) Rules applying for the matter to be heard urgently. The supporting affidavit of Mr. K. M. Pandya, advocate, averred:

- (1) that on 4 January 1972 it was learnt that the deceased had died on 10 April 1971; and
- (2) that the time for filing the suit would expire on 13 January 1972.

On 20 January 1972 the petition was granted as prayed.

On 22 March 1972 the plaint in the present suit was filed. After reciting the above facts it goes on:

“7. At the time of the death of the deceased no suits were pending in which he was a party, nor was any of the aforesaid intended suits a suit touching the matters at issue in any cause or suit pending at the time of the death of the deceased.”

It concludes by praying for an order that the grant issued to the defendant in Probate and Administration Cause 1 of 1972 be revoked or annulled. The defence raises matters which are no longer in issue. It denies paragraph 7 of the plaint and states in paragraph 6:

“that in the circumstances of the case the court in the exercise of its powers correctly issued to the defendant grant of Letters of Administration limited for the purpose of representing the deceased's estate in the said two suits.”

Mr. Anjarwalla, for the plaintiff, submitted that the issue was limited to a construction of section 222 of the Act under which the petition was brought whereas Mr. Inamdar, for the defendant, reserved the option, in case I held that the section did not apply to this suit because of its express terms, that there was a lacuna in the Act which should be filled by invoking section 3(1)(c) of the Judicature Act (Cap. 8). He argued that this was a question of the jurisdiction of the court which could not be decided by reference only to section 222 and which did not need to be pleaded.

Section 222 of the Act provides:

“When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

Mr. Anjarwalla submitted that the section covered two cases in which representation might be granted to a nominee of the parties in a suit:

- (1) where there is a pending suit which is “the said suit” in line seven of the section; or
- (2) where a suit may be commenced and that suit is touching the

matters at issue in “the said cause or suit” which is the pending suit.

A suit is defined in section 2 of the Civil Procedure Act as meaning “all civil proceedings commenced in any manner prescribed” and “prescribed” means:

“prescribed by rules”. section 81 of the Act provides for the making of rules by a Rules Committee and the Civil Procedure Rules, as amended from time to time, were made under that provision. The nature of a suit was considered in *Mandavia v Rattan Singh*, [1968] EA 148.

Page 52 of [1974] 1 EA 50

A suit is “pending” as soon as commenced and until it is concluded: *Stroud's Judicial Dictionary*, 3rd ed., Vol. 3, p. 2141.

It is not in dispute that there was no pending suit when the applicants petitioned for a limited grant for the purpose of filing a suit.

On the second limb of section 222 Mr. Anjarwalla argued that the words “in the said cause or suit” in the tenth line refer to the earlier mention of the word “suit” and by such reference it must be confined to a pending cause or suit. A new suit may be commenced provided that it is touching the matters at issue in the said pending cause or matter. For example, the applicants might wish to sue another party in a suit which is pending. A new suit will be touching all the matters in issue between the parties and not the matters at issue in the said cause or matter.

Mr. Inamdar pointed out that if this construction is correct the applicants would be completely without a remedy against a wrongdoer who is dead at the time the suit is sought to be filed and whose heir has renounced his or her right to apply for letters of administration of the estate. For instance, if B and C were passengers in a car driven by A and were injured in an accident as a result of A's negligent driving and he was killed in the accident then unless his heirs take out letters of administration, B and C would have no legal remedy for damages caused by A's negligence. Mr. Inamdar submitted that, while section 222 is inelegantly drafted, it deals with two situations:

- (1) relates to a suit which is already pending; and
- (2) relates to a suit which is intended to be filed.

He stresses the distinction between the words “or in any other cause or matter” in line seven with the word “suit” in the earlier part of the section. The words “in the said cause or matter” in line ten can only refer to “any other cause or matter” which appear earlier. Otherwise if they were referring to a pending suit the words would have been “said suit” or “said pending suit”. The other cause or suit does not have to be in the same court or between the same parties as in a pending suit. It covers a suit which may be commenced arising out of a dispute between the parties. There is no justification for limiting the words “touching the matters at issue in the said cause or suit” to a pending suit.

Considering that section 222 of the Act has been in existence since at least 1865 and bearing in mind the number of High Courts in India there is a remarkable dearth of authority on its construction. In the Indian Succession Act, 1925 it is reproduced as section 251 and the commentary by Paruck, 4th ed., p. 487 merely says: “The suit may be one already filed or intended to be filed”. It refers to *Khotodad v Bai Jerbai* (1938), 62 Bom. 64 but that case is of no real assistance as it dealt with the substitution of a deceased defendant in a pending suit. In *The Law of Succession* by Bashu, 4th ed., p. 732 the scope of the section is said to cover commencing or substantiating proceedings in Chancery and it goes on to refer to English cases. In *Gibbs v Roy*, 85 C.L.J. 280 it was decided that “rationally the appointment of an administrator *ad litem* is to enable the court to make a decree in respect of a person who is dead so that the decree may be binding on his estate. It is a matter of convenience and procedure and when the claim against the estate is about to be barred by limitation, it is also matter of necessity”. There the defendant was appointed under section 251 of the 1925 Act “in a suit to be commenced” by the plaintiff and the judgment states that this is the usual form in which a grant is made to an administrator *ad litem*. Although this decision is not binding on the courts in Kenya it is a persuasive authority and in the interests of uniform construction of an Act which is applicable in both countries. I think that I should follow it.

As I agree with Mr. Inamdar's construction of the section it becomes unnecessary for me to reach any firm conclusion on his second argument which assumes that section 222 of the Act did not cover the present case. The petition was fairly and squarely based on section 222 and I doubt whether outside provisions can or need be invoked to justify the grant. Of course it would be futile for the petitioners to apply at this stage to amend their petition or to bring a fresh petition as the suit would be time barred.

However in deference to Mr. Inamdar's argument and as I think it helps to consider the position of an administrator *ad litem* I will try and summarise it.

The jurisdiction of the High Court is set out in section 3(1) (a), (b) and (c) of the Judicature Act. The Indian Succession Act is a written law falling under (b) and if it is not exhaustive in any particular matter recourse may be had under (c) to the substance of the common law, doctrines of equity and statutes of general application in force in England on 12 August 1897. He referred to *Secretary of State for Foreign Affairs v Charlesworth, Pilling*, [1901] A.C. 373 and *Said bin Seif v Shariff Mohamed Shatry* [1940], 19 K.L.R. 9 which considered situations which might arise where the appropriate Indian Applied Act might not fit the case and recourse might be had to paragraph (c) in section 3(1) of the Judicature Act. Mr. Inamdar pointed out that the Act which was to amend and define the Law of Intestate and Testamentary Succession in British India was not a Consolidating Act and therefore was not exhaustive and recourse could be had to other enactments, or general principles of law, on points not covered by it: Das's *The Arbitration Act*, 2nd ed., p. 3. On the other hand Mr. Anjarwalla referred to the elaborate provisions relating to limited grants in Part XXX of the Act. In England the Court of Probate Act 1857, section 73 enabled the Probate Court to make a limited grant where "it is necessary or convenient by reason of the insolvency of the estate . . . or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased other than the person who would have been entitled to the grant": *In re Elizabeth Wensley* (1882), 7 P.D. 13. *In the Estate of A. B. Simpson*, [1936] p. 40 a similar grant was made where the deceased's only

estate was the benefit of a third party indemnity policy effected with a Motor Insurance Company and the person injured in the accident desired to claim damages against the estate of the deceased, as in the present case. Similarly in *In the Goods of Knight*, [1939] 3 All E.R. 928 the grant was made to the Official Solicitor limited to his defending the proposed action.

I have no reason for believing that section 222 of the Act was not designed for the same purpose as section 73 of the Court of Probate Act, 1857, as subsequently amended, and that this purpose is reflected in its wording.

The suit is dismissed with costs.

Order accordingly.

Trouistik Union International & another v Jane Mbeyu & another

1. Trouistik Union International
2. Ingrid Ursula Heinz.....Appellants

and

1. Mrs. Jane Mbeyu
2. Mrs. Alice Mbeyu.....Respondents

(Appeal from a judgment and decree of the High Court of Kenya at Mombasa (Mr. Justice Bosire) dated 17 October, 1989 in H.C.C.C. NO.172 OF 1987)

Judgement of the Court

This appeal was well argued by counsel on both sides. However, when the submissions were concluded on October, each member of the Court, independently reached the same conclusion, namely, the appeal based on the competence of the action on the Law Reform Act must succeed.

The appeal was listed before a bench of three judges in Mombasa on the 20 July, 1993. When the hearing opened, counsel for the appellants informed the Court that he would seek a reversal of a judgment of this Court composed of the ordinary bench of three judges. The issue, he said, would be material to this appeal and invited us to consider constituting a full bench of five judges. When this matter was put to counsel for the respondents, he readily agreed.

In *Income Tax v T* [1974] EA 546, Spry. Ag.VP, speaking for the Court said:

“I would also remark that where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges although a bench of three has the same powers”.

That request was made to us and acceded to. This explains the somewhat unusual composition of the Court.

We must now relate briefly to the facts, which are far from unique. A man of about 65 years of age by name John Katembe who was said to be a retired chief, lived in Mombasa. On the 10 April, 1984, he was, according to the evidence, walking along the Tom Mboya Avenue in that city. At about 8.00a.m, he was knocked down and severely injured by a saloon car driven by the second appellant. The accident took place near a zebra crossing. He was taken to hospital but succumbed to his injuries. The bus driver who took him to the hospital, said he died in the course of examination by a doctor.

On the 10 March, 1957, the respondents who claimed to be widows of the deceased, brought an action in the High Court, Mombasa. They claimed that he knocking down and inflicting injuries on the deceased from which he met his end, the second appellant was negligent. They, therefore, claimed damages under two pieces of legislation namely, the Law Reform Act (Cap.26) and the Fatal Accidents Act (Cap.32) against the second appellant and her employer. On the pleadings, both appellants denied negligence.

However, when trial opened before the High Court, the appellants admitted negligence and the learned judge was not troubled with any evidence or argument on that issue. After listening to and weighing the evidence presented to him, the judge, in a full and well reasoned judgment, awarded damages to the respondents under the two Acts.

With regard to the compensation under the Fatal Accidents Act, the learned judge lamented the paucity of evidence on which he could comfortably base an award. But he thought the respondents should not be denied compensation only on that ground and that it was his duty to do the best he could with the available material. And having done so, he reached a figure of damages. Although some of the grounds in the memorandum of appeal suggest that the quantum of the award was to be challenged before us, no complaint on the quantum of damages was addressed to us. In our opinion, the judges approach to the paucity of evidence on the question of the loss of dependency was right and his eventual award was fair and reasonable. We have not been invited to disturb it. In any event, any invitation to us to interfere with that award, would not have had

the slightest prospect of success. So, whatever may be the fate of this appeal in any other respect, we would affirm the damages awarded to the respondents under the Fatal Accidents Act as well as the modest sum of KShs. 6,100 awarded them for funeral and incidental expenses.

But the real battle that was fought before us, was on the learned judge's award of damages to the respondents under the Law Reform Act. Simply put, the appellants complained that the respondents lacked standing to present and prosecute a suit for the benefit of the deceased's estate. The reason they say, is because the respondents did not obtain letters of administration before commencing the suit. Accordingly, they say the award of damages made in their favour was void as was the action itself. The respondents replied that the suit was competently filed and that the judge's holding that it was a valid suit was right and should not be disturbed. To buttress their submission, they cited and relied on a decision of the ordinary bench of the court in the case of *Roman C Hintz v Mwangombe Mwakima* (1988) 1 KAR 482 decided on the 26 July, 1984. In that case, as in this, the capacity of a plaintiff to commence an action for the benefit of a deceased's estate under the Law Reform Act was disputed. In a split decision, the Court decided that such an action could be competently set or foot without first obtaining letters of administration.

The appellants say, that that case was wrongly decided or at any rate, is no longer good law and invited us to so hold. This is a bold submission and we must examine whether that contention is soundly based.

The common law rule on this matter is expressed in the Latin maxim '*action personalis moritur cum persona*' that is, a personal action dies with the person. This rule was, to a large extent, supplanted by the Law Reform Act. That Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment, is the Law of Succession Act (Cap 160), Section 2 of that Act

provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act “shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act”.

The Act came into force on the 1 July, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the 10 April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. That Section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3 the interpretative section, provides an all inclusive answer; It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act”.

It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which survived the deceased, were not persons to “whom a grant of letters of administration have been made under the Act” i.e. the Law of Succession Act. They did not even pretend to be such. The only capacity in which they sought to enforce the deceased's chose in action, was as dependants as the professed widows and dependants of the deceased, it was within their legal competence to claim damages for loss of dependency under the Fatal Accidents Act.

But paragraphs of their amended plaint averred that “the plaintiffs bring the action under the Provisions of the Law Reform Act and the Fatal Accidents Act and the following persons as the dependents of the deceased who have suffered loss and means of support and maintenance. The plaint then mention the plaintiffs as widows and five minors.

Apart from other submissions the appellants by Counsel, contended that as the respondents sought damages under the Law Reform Act without first obtaining letters of administration they lacked standing and their suit was incompetent therefore. This was disputed by the respondents who, for their part, relied on the *Hintz* case to which we referred. The appellants replied that the holding was overruled in the subsequent holding of the Court of Appeal in *Virginia v Joash Ougo and another* (1988) 1 KAR 1048 decided in 1987.

The learned trial judge gave consideration to these conflicting submissions and in the end, resolved it in the respondents' favour. He held that the *Hintz* holding was still good law and that:

“the plaintiffs in this case have the capacity to bring this action under the Law Reform Act having not purported to bring it as administrators of their deceased husband's estate without letters of administration”.

Having so held, he proceeded to award damages in their favour. A close reading of the judge's judgment suggests that his real reason why he thought the respondents could competently sue to enforce the deceased's chose in action was because “they established a sufficiently close relationship with the deceased.” So he pronounced categorically as follows:

“I hold that the plaintiffs in this case had the capacity to bring this action under the Law Reform Act, not having purported to bring it as administrator of their deceased husband estate without letters of administration”.

The learned judge did not advert his mind to the Law of Succession Act from which he could have derived a great deal of assistance and by which he was bound. Such help as he thought he could get was from the majority judgment in the *Hintz* case.

Now, what is the ratio of the judgment in that case? The leading judgment of the majority was delivered by Chesoni, Ag. J.A. (as he then was). Having distinguished the English law from Kenya law, he said:

“In the present case, the deceased's cause of action was a chose in action. It was property. in Kenya, I would say an intestate's property is

transmissible to his personal representatives e.g. next of kin, although it may also vest in his legal representative e.g. executor or administrator as the case may be. The deceased child property was on his death therefore to and not vested in his father”.

With great respect, we have not found it easy to comprehend what seems to be an authoritative statement of the succession law in Kenya. No customary notions were involved in this case. At common law, death by itself automatically divests the deceased of his chose in action the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity. According to English law, before the Judicature Act 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the judge of the Court of Probate and since 1925, by the proviso of the Administrator of Estates Act of that year, the property of an intestate before grant vests in the President of the Probate Divorce and Admiralty Division. In some Commonwealth jurisdictions, such right is vested in the Chief Justice or some other statutorily designated body or entity. Our Law of Succession Act (Cap.160) did not provide for the vesting of an

Property between the date of death and the grant of letters in any entity so Kneller J.A. suggested in the *Hintz* case, that it will be vested in the Courts. Such a suggestion conformer with common law notions of the transmission of an intestate's right or estate. It ought to be remembered that all these temporary custodians of an intestate's rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by the force of the grant in the administrator,

With great respect, we find no warrant for Chesoni J.A.'s statement that in Kenya an intestate's property is transmissible by the fact of death to his personal, representatives whom he equates with his next of kin. Neither do we find any authority in law for his somewhat contradictory statement that the child's property was, on his death, transmitted to and not vested in his father. We think this statement, with respect, shows some confusion of thought. If

death by itself transmitted the estate to his father why did it not vest it in him? If the chose in action was not vested in him and as it was not his own chose then what standing did he have to enforce it by action? Clearly, he could not have done it under the Law of Succession Act (Cap.160) or even the Indian Succession Act which was repealed in 1981. Then in the concluding sentence of his judgment he said:

“For the reason– stated, I would hold that the respondent has capacity to sue under the Law Reform Act as the deceased’s personal representative the cause of action having been transmitted to the respondent on his son’s death.

It is to be noted that the learned judge did not say the cause of action “vested” in his father. If it was validly transmitted to him by law, why did the learned judge shrink from saying it was vested in him? That is the appropriate word in this branch of the law and that is the word used by the Law of Succession Act.

With profound respect, the concurring judgment of the late Nyarangi J.A. was no more enlightening than his learned brother’s. He quoted Section 191 of the Indian Succession Act that:

“Letters of administration entitle the administrator to all rights belonging to an estate as efficiently as if the administration had been granted at the moment after death”.

But with respect, that Section did not help his appreciation of the issue in this case. If letters of administration vests all rights of an intestate in the administrator at the moment of death, what right would Mwag’oba’s father have left to agitate his son’s preserved chose-in-action if some other person than himself, were granted letters of administration? Surely, there would be no right which can provide a standing for himself or his “personal representatives”, which in his terminology, means close relatives, to litigate his deceased son’s statutorily preserved chose in action? But it should be remembered that “personal representatives” as known in this branch of the law, are persons who obtain probate or letters of administration and not blood relatives however close. We think, with respect, both concepts were confused in the majority judgment.

The difficulty of the majority judgment can be shown by the following illustration. "A" and "B" are the deceased's father and mother respectively. He was killed in a motor accident in circumstances which show that he has a cause of action against the tortfeasor; but he died intestate. "A" and "B" are estranged and live separate and apart from each other. "B" obtained letters of administration under the Law of Succession Act. "A" relied on the fact that the deceased was his close blood relative.

On the judgment of the majority, "A" has a right to administer his son's estate which was "transmitted" to him by some unspecified law. If the two are in disagreement as to who should enforce their son's chose in action, on the judgment of the majority, both have *loci standi* to sue although they are wearing two different hats. With respect, that is of the majority view. It is clear only "B" and not "A" has *locus standi* to enforce by action their Son's Single chose in action under the Law Reform Act.

Had Bosire J. in this case applied the clear provision of the Law of Succession Act he would have been obliged to reach the conclusion that the deceased's chose in action cannot properly be vested in or be agitated in court by wives qua wives. We think he was led into error by reliance on the majority decision in *Hintz* case which, in our opinion, is incapable of support.

This Court is not the only judicial organ that has felt unimpressed either by the reasoning or conclusion of the *Hintz* judgment. Our attention has been drawn to no fewer than three Judgment of the High Court which felt unable to subscribe to the *Hintz* ruling that in Kenya a plaintiff who has not obtained letters of administration has the right to enforce a chose in action belonging to an intestate's estate. In *Kidede v Amin* (H.C.C.C. No.83 of 1973) (unreported) Simpson 3, refused to award damages for loss of expectation of life to the estate of an intestate under the Law Reform Act as no letters of administration were taken. In 1988 in *Ochola v Langat* (H.C.C.C. No. 3081 of 1986) (unreported) Simpson J refused to award damages under the Law Reform Act to a plaintiff who had taken no letters of administration in respect of an intestate's estate. In 1990

in *Kuria v Shah* (H.C.C.C. No. 122 of 1986) (unreported), Akiwumi J. (as he then was) concurred with the decision of Shields J. in the *Ochola* case and declared as incompetent a plaint in which a plaintiff sought to sue in respect of an intestate's estate without first obtaining letters of administration that is the beaten track of the decisions.

But by far, the highest judicial authority which, by necessary implication repudiated the holding in the *Hintz* case is the oft cited *Otieno v Ougo* case decided in 1987. The question at issue in that appeal was the right of a widow to bury her intestate husband when she obtained no letters of administration to his estate. The Court gave vent to an important principle of Law of Universal application with respect to the right of a party to fulfil the role of an administrator of an intestate without obtaining letters of administration the court, *inter alia*, observed:

“The administrator is not entitled to bring an action as administrator before he has taken letters of administration if he does the action is incompetent at the date of its inception”

It is significant that Nyarangi J.A., who co-authored the *Hintz* judgment and who presided over the *Ougo* appeal, subscribed to this statement of the law or at any rate, did not dissent from it. It was he who stated in the now famous *Hintz* case that:

“It seems to me, having regard to Section 2 of the Law Reform Act that a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of a deceased estate without a grant of probate or letters of administration to the estate”.

The *Hintz* decision has stood for nine years, but its life was not undisturbed, its authority as a judicial precedent has been seriously undermined by the many cases to which we have referred. Perhaps, it is not uncharitable to conclude that its nine-year life was undeserved and we should now give this decision, whose life is in the balance, its “*coup de grace*” and lay it safely to rest.

Mr. Pandya, who successfully relied on the *Hintz* judgment in the court below, submitted before us that it was rightly decided and the

interpretation put on the Law Reform Act in that case was correct so he argued for its affirmance. But he put before us no reasoned argument which carried in our minds the slightest conviction that the case was other than wrongly decided. As a last ditch argument, he submitted that even if that case was wrongly decided, as it had stood for a long time, it should not be disturbed and cited in support, the Judgment of the East African Court of Appeal in *Income Tax v T* [1974] E.A. 546.

In Our Opinion, that Judgment lends no aid to the respondent's argument. Its main holding is that the judgment which was appealed against in that case was not given *per incuriam*. The Court observed that a decision can only properly be said to be given *per incuriam* where it is given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned. It is plain that the *Hintz* judgment cannot, by any stretch of imagination, be said to have been given *per incurram*. It was not given in ignorance or by oversight of any written law or binding decision. All the relevant written laws were considered as well as pertinent case law. Indeed, the learned presiding judge of the Court (Kneller J.A.) expressed his open disagreement with it. And as we have tried to show, his lone voice was the correct one. In our opinion, the true view is that that appeal was simply wrongly decided.

Mr. Pandya then submitted that even if *Hintz* case was just wrongly decided, it has stood for a long time and has been acted upon in the belief that it was right. And on that account, it should be left undisturbed. Although counsel did not say so, he could only have been relying on the common law maxim "*communis error facit jus*" (common error sometimes passes current as law). In Our Opinion, that rule cannot properly be invoked in this case. The *Hintz* decision has not been an accepted law, much less universally acted upon. Even Courts whose jurisdiction is inferior to this Court and who are ordinarily bound under our doctrine of *stare decisis*, have consistently defied rather than followed it and it is impossible to see what rights could have been founded on it and by whom. We reject the argument that we should keep alive a decision that is plainly wrong and which has nothing but a disturbed life of nine years to commend itself.

Mr. Khana invited us to say that the *Hintz* appeal was wrongly decided by the majority and that we should overrule it. In view of what we said in the foregoing paragraphs we respond positively to that invitation and hold that the *Hintz* case is no longer good law, if it ever was. We think it must go and the decision of Bosire J. which was founded on it, must go with it.

We conclude, therefore, that the damages awarded in favour of the respondents in the sum of KShs. 50,000 under the Law Reform was wrong and ought to be set aside with costs. We do so order.

Dated and delivered at Nairobi this 19th day of October, 1993.

F.K. Apaloo

.....

Chief Justice

R.O. Kwach

.....

Judge of Appeal

A.M. Cockar

.....

Judge of Appeal

R.S.C. Omolo

.....

Judge of Appeal

P.K. Tunoi

.....

Judge of Appeal

I certify that this is a true copy of the original

.....

DEPUTY REGISTRAR

**In the Matter of the Estate of Morarji Bhanji
Dhanak (Deceased)**

[2000] LLR Number 100014 (HCK)

Republic of Kenya

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1731 of 2000

1. Limited grant – The problem
2. The explanation to the problem
3. Procedure in coming to court
4. Types of limited grant

In the Matter of the Estate of Morarji Bhanji Dhanak
(Deceased)

RULING

All reference to section and rules refer to the Succession Act Cap. 160 unless otherwise stated:

A) Limited grants: The problem

I was assigned to the Probate Portfolio of the High Court of Kenya at Nairobi for the month of November, 2000. I noted with concern the procedure in which parties acting in person or through their advocates would come to court when applying for limited grant. This being that each applicant would file an application in order to obtain a limited grant. This position was quite different from when I last dealt with probate matter a year ago in 1999. Secondly, I was concerned that application for limited grant was coming into court by various rules and sections within the Succession Act Cap. 160.

For instance, applicants would pray for limited grant by evoking either section 54, or section 67 or rule 36. There never was one uniform prayer for coming into court for a limited grant.

I kindly requested about 30 advocates who have applications for limited grants pending before me (see appendix of this ruling) to

submit to me on the following points:

- 1).
 - a) What is the purpose of limited grants?
 - b) How many types of limited grants do we have?
 - c) What is the procedure to be used to come to court?
- 2) What is a limited grant *ad colligenda bona*? What is its purpose and what procedure is used to come to court?
- 3) How do we deal with the urgent hearing of an application and the procedure in which to come to court?
- 4) What substantial laws can be relied on in support of the submission of limited grants?

B) The explanation to the problem

The advocates who appeared before me chose Mr. R. Hira, Miss Majiwa, Mrs. Irungu and Mr. Nelson Kaburu to address me on this point. Mr. Kaburu made independent submissions as he did not entirely agree with the other advocates.

i) The Problems

One of the major problems that arose was an internal memo issued by the Senior Deputy Registrar to all the staff in the registry of the Family Division. This memo is dated 22 March 2000. It was copied to the Registrar of the High Court of Kenya. It was never copied to any advocates, most of whom were unaware of it. It nonetheless explained the change of procedure in dealing with limited grant.

The internal memo was issued at the directive of the judge then presiding on probate and read as follows:

“I wish to bring to your NOTICE that the judge now presiding on probate and administration matters has directed that before approving any newly filed matter the following should be in the file:

- a) Death certificate of deceased and any other person may have benefited from the deceased's estate but has passed away (e.g. spouse, child).
- b) Marriage certificate of a petitioning spouse or letter from chief as proof of marriage to the deceased.
- c) Consents from other beneficiaries. This requirements applied to Limited Grants as well.

- d) Searches in respect of land belonging to a deceased person.
- e) Limited grants to be by way of application before a judge when specific orders will be granted.
- f) All complaints to be direct to the Senior Deputy Registrar and NOT to the judge unless so directed by Senior Deputy Registrar”.

(Emphasis mine).

I am not certain why the purpose of this directive was issued but perhaps it may be to curtail the enormous fraud that may often arises in probate matters.

The advocates argued that the Senior Deputy Registrar had in fact no powers to issue such a memo. This power lies only with the Chief Justice who is permitted to issue a practice rule note.

Mr. Kaburu brought my attention to section 97 whereby the rules committee, “may make rules of procedure generally for the carrying out, of the purposes and provisions of [this] act . . .”.

I believe it is the rules committee who are empowered by the Act to make rules pertaining to the procedure of coming into court, for example:-

Section 97(b).

“The procedure to be followed by a court in granting probate or letters of administration.”

ii) The practice before coming into court

The past practice that had been in these courts for granting probate or letters of administration is for there to be a petition made by an applicant. The Deputy Registrar in charge of the probate matters would ensure that the correct forms have been filed. If satisfied that the file is in order the Registrar would minute to the Honourable Judge in charge of the probate that all the papers are in order and that the matter was ready for gazettment. The Honourable Judge would give orders that the application/petition for grant should be gazetted.

Thirty (30) days after the gazettment, the Deputy Registrar would make a minute in the file praying that letters of administration or probate do issue where no objections have been filed.

The Honourable Judge would order and have issued letters of administration or probate.

In the same way, limited grants filed was so done by way of petition and would in fact be minuted in the file by the Deputy Registrar. The Honourable Judge would make orders granting that limited grant be issued. No parties appeared before the Honourable Judge. No notice in the Kenya Gazette would be issued under section 67(1) which exempted limited grant from advertisement. This section reads as follows:

“No grant of representation other than a limited grant for collection and preservation of assets shall be made until there has been published notice of the application for the grant inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication and the period so specified has expired.”

Mr. Kaburu submitted that only limited grant *ad colligenda bona* are permitted to be issued without prior advertisement. All other grants must be advertised. In fact most of the advocates who have applications before this court want limited grant for filing suit and not for collecting on behalf of the estate. As such the pending application or limited grant should all be struck out as being defective in form.

I had brought to the advocates' attention the case of:

Anthony Njogu Mureithi – deceased; In the matter of an application for grant of letters of administration (limited) by Gladys Wakathi Muthui – mother. Succession Cause No.5 of 96 at Mombasa.

In which my brother Waki J outlined the requirements of the Court of Appeal case of:

Troustik Union International and another v Jane Mbeyu and another (1993) eKLR CA/4590 (unreported).

It required that it was necessary to obtain letters of administration before an action could be brought to court.

He nonetheless recommended that the procedure to be followed is that once formalities have been complied with:

“the file is placed before the Deputy Registrar to confirm their propriety and a minute is addressed to a judge to append his signature ...The applicant need not file chamber summons to appear before the judge.”

I would be persuaded only on procedure by the above decision and hold that the proper format to come to court for a limited grant be in the same way as one would come in for a grant of probate or letters of administration. Namely, that once a petition is filed then the Deputy Registrar would minute to the Honourable Judge who would grant the orders or otherwise for a limited grant to issue.

I believe this procedure was initially adopted due to the numerous numbers of applications which require to be and are filed.

iii) Urgency in bringing an application

If there is a certificate of urgency, the file should first go to the Deputy Registrar to minute then to the Honourable Judge.

iv) Limited grants

This brings me to the fourth issue. Namely,

- a) How many types of limited grants are there?

I formed the impression that majority of the advocates who appeared before me were not aware of the different types of limited grants there are. Most advocates would come seeking for prayers for limited grant for filing suit yet their petition would be for letters limited for *ad colligenda bona*.

From the submissions made before me, the following seems to be the different types of Limited Grant. These are:

- 1) Limited grants *ad colligenda bona*
- 2) Limited grant *ad colligenda bona defuncti*

- 3) Limited grant administration *pendente lite*
- 4) Limited *grant ad litem*

In our Kenyan Law of Succession, limited grants *ad colligenda* can only be issued by the High Court of Kenya sitting at Nairobi, Mombasa, Kisumu, Nakuru and Nyeri only (see section 47, rule 36(3) LN 223/92).

The magistrates court have jurisdiction to hear succession matters only if the respective magistrate (not less than a residence magistrate) is appointed by the Honourable Chief Justice to so act on behalf of the High Court. If that magistrate is stationed where there is a High court in existence, then the High Court has exclusive jurisdiction.

The Act recognises that there are remote areas in Kenya where parties may wish to have estates less than Ksh.100,000 to be administered. In such a situation a resident magistrate may issue letters of administration and grant. This would include a limited grant where the value of the estate is less than Ksh.100,000.

No magistrate is permitted to deal with a probate matter where the High Court is established in the same station, no magistrate is allowed to hear a matter involving revocation of grant and no magistrate is permitted to issue limited grant *colligenda bona* unless it is of apparent urgency and only limited to collection of assets situated within his area and for payment of debts. The estate is not to exceed Ksh.100,000.

The Act states under section 54, one of the forms of grant as being limited grant.

“a court may, according to the circumstances of each case limit a grant of representation which it has jurisdiction to make, in any of the forms described in the 5th Schedule.”

It seems that there is an argument that section 54 states the limited grant whilst section 67 outlines its procedure. I do not think this is the position. There is most certainly a difference. This section reads:

- “1. No grant of representation other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant . . .”

Under the probate and administration rules, it deals with limited grant *ad colligenda bona*. Rule 36 reads as follows:

“36(1) where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.”

It is section 67(1) that describes the above rule.

What then is a *colligenda bona defuncti*? (See above).

Mr. Kaburu was able to provide the definition of this from his authorities. There are in fact two words:

- i) *ad colligendum*
- ii) *ad colligenda* means “For collecting; as an administrator or trustee *ad colligendum*”.
- iii) *ad colligenda bona defuncti* means. “For collecting the goods of the deceased”.

It therefore means that rule 36(1) is specifically on the collection of the deceased's goods and preserving the same.

Ad colligenda bona under the Indian Succession Act:

“where it is to the benefit of the absent or unknown next of kin, the court will direct an administrator *ad colligenda bona* . . . under special circumstances limited to collect the personal estate of the deceased, to give receipts for his debts or the payment of the same, renew lease of his business premises which would expire before a general grant could be but without powers to dispose of the lease...”

I am aware that the rules require that each time the court issues a limited grant *ad colligenda bona defuncti* it must be recorded in a register kept at the registry.

The applicant is to file Form P & A 85, petition and form P & A 19 the affidavit which is provided for under rule 12 of the probate and administration rules.

Now the advocates are not interested in collecting the goods of the deceased or to administrator the estate perhaps. What they wish to do is to obtain a grant for purposes of filing suit.

I believe they require to rely on section 54 which takes us to the 5th Schedule of the Act. This Schedule outlines four types of limited grant.

A) Grant limited in duration - (paragraph 1-3)

This provides for a situation where a will is lost or misplaced; in possession of a person outside Kenya or for a will that cannot be found.

A limited grant under this paragraph may be issued pending the original will being found.

B) Grant for the use and benefit of others having right

Where the executor is absent from Kenya; whether there is a will, letters of administration, will annexed or in a case of intestacy (see paragraph 4-6).

Where the executors are minors or of unsound mind (see paragraph 7,9).

Where a suit is pending touching validity of will. In this latter situation (paragraph 10) it is a situation known as administration *pendente lite*. (see 3 above).

The meaning of administration *pendente lite* is where a grantee is appointed simply to administer the estate of the deceased during litigation. For instance, if the will of the deceased is being contested, pending the determination of that dispute the court may appoint a *grantee pendente lite* to continue to administer the estate so as it is not wasted. The grantee is not permitted to distribute the estate but merely manage the same pending litigation.

The grant limited *ad litem* (see 4 above) is one normally used for prosecuting or defending proceedings began in a court of justice. This type of grant is covered within our Succession Act in the 5th

Schedule paragraph 11–16. It has been described as Grant for Special Purposes.

C) Grant for Special Purposes

- a) Where an executor is appointed for a limited purpose specified in the will (see paragraph II). Where an executor gives authority to an Attorney specified to a particular purpose.

Where a sole surviving trustee dies leaving no general representative or one who is unable or unwilling to act as such (normally referred to as *de bonis non* (see paragraph 20 form 87 and 19 in rule 12).

Where a deceased being party to a pending suit dies and the executor or the person entitled is unable or unwilling to act – a representative requires to be appointed (see paragraph 14).

Where the person to whom probate or letters of administration has been made is absent from Kenya, a limited grant may be given for the purpose of enjoining a party to a suit brought against the administration (see paragraph 15).

Where it appears to the court to be necessary or correct to appoint some person not normally entitled to administer an estate or part thereof as the court thinks fit.

The other grant is Grants with exception.

D) Grants with exception

Paragraphs 17, 18 and 19 provide for situation where grant be made subject to certain exceptions.

Under what rules should a person intending to file suit where the deceased having been or intended to file suit dies?

Mr. Hira argued that as the estate has remained unadministered, limited grant *colligenda bona* is sufficient to preserve the estate. If one applies under this grant then such a party has a right to file suit. That is what I understood the arguments submitted as being.

Mr. Kaburu on the other hand described this as administration *ad litem*. This is equivalent to paragraph 14 of the 5th Schedule. It is equivalent to section 222 of the Indian Succession Act 1865 (later section 251 of the same Act) and section 162 of the Judicature Act, 1925 of England. The words in all the three Acts are identical.

Namely, administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administrator is unable or unlikely to act, letters of administration may be granted to the nominee of a party to the suit, limited for the purpose of representing the deceased herein or in any other cause or suit which may be commenced in the same, or in any other court between the parties, or any other parties touching the matters at issue in the cause or suit and until a final decree shall be made therein and carried, into complete execution”.

The Indian Succession Act (1865) section 222 was applicable in Kenya. It was considered in a Mombasa High Court case of *Hadija v Iddi* 1974 EA 50 by Sir Dermont Sheridan J.

In the above case, the defendant was appointed the personal representative of a deceased driver against whom a claim was to be made. The plaintiff filed suit seeking for the letters of administration be set aside arguing that letters can only be issued when there is a pending suit.

It was held by the High Court, in interpreting section 222 of the Indian Succession Act, which is identical to paragraph 14 of the 5th Schedule, that the appointment of a personal representative may be made even when there was no suit pending. (The case of *Gibbs v Roy* 85 CLJ 280 was considered).

Although this authority was dealing with a different aspect to paragraph 14, it most certainly noted that in order to apply for a grant limited to filing suit the rule becomes applicable.

In contrast, I did rule in *the Estate of Nyamondi Succession Cause* case that the application for limited grant was not entirely correct.

A corporation filed suit against the deceased whilst she was still alive. The deceased died. Her husband had predeceased her. The only person entitled to the estate were her adult children. All of them refused to take letters of administration intestate. The limitation of time in bringing a personal representative was running out.

The corporation applied, under a certificate of urgency to file an application under paragraph 14 praying for this court to appoint the children as administrators.

I decline to do so as the rules require that the corporation nominate a person to take up the letters limited to the suit. This could have been the Public Trustee or even an advocate, which had not been done.

Procedure for Limited Grant

What I find is that advocates wishing to apply for limited grant for purposes of filing suit should come under paragraph 14 of the 5th Schedule. I would agree with Mr. Kaburu that this paragraph applied to intending or proposed plaintiffs.

Although the Act is clear on the affidavit to be filed as prescribed in rule 12, namely form P & A 19, the petition has not been prescribed to. The nearest form is P & A 90, which is for grant *pendente lite*.

The Act is not silent on such situation. Where it comes to the forms to be applicable rule 70 is most helpful. It reads:

“The forms set out in the first schedule, with such adaptations, additions and amendments as may be necessary shall, when appropriate be used in all proceeding under these Rules:

Provided that the Chief Justice may by notice in the Gazette vary the forms and prescribes such other or additional forms as he thinks fit”.

This means that any applicant may modify, adapt or add to the form.

“Section 72 of the Interpretation and General Provision Act Cap. 2 provides that, save as is otherwise expressly provided, whenever any form is prescribed by any written law an instrument or document which purports to be in that form shall not be void by reason of any duration therefrom which does not affect the substance of the instrument or document and which is not calculated to mislead.

Although the collection of forms in this Schedule does not purport to provide for every circumstance that may arise it contains the majority of the forms which, if adapted when

necessary will be found to be of general use by legal practitioners and members of the public”.

(Emphasis mine)

It therefore means that both the legal practitioner and members of the public may adopt the forms to suit the petition they are to bring in, if it has not been provided.

As stated earlier form P & A 90 is the nearest form to which limited grants may be adopted. I believe the parties can use this with the following modification below.

I have attempted to outline petition for letters of administration *ad litem* with the sole purpose of filing suit. I have also outlined the type of grant that should normally be issued and similar to form P & A 47.

(SAMPLE OF A PETITION)

Form 90(B)

(5th Schedule para 14, r12)*Petition for letters of administration where there is a will petition for grant of letters ad litem**ad Litem (b)*

(Heading as in Form 1)

I CD of
 Hereby petition this Honourable court for a grant of letters of administration *ad litem* of the estate of the above named AB who died domiciled in (*state where*)..... on the....., 20limited to my filing suit (or to approving KL as personal representative for purpose of filing suit and without power of distribution of the estate.

and say as follows:-

- 1) There is now pending in this Honourable court a suit against (the deceased estate, for the deceased estate) being suit No.(*state case number*)
- 2) I present this petition in my capacity as.....
- 3) That a grant of administration *ad litem* do issue limited for the purpose (*of filing suit/defending a suit or representing suit*).
- 4) That I have no powers to distribute an estate under this grant. Signed by the above named ID.....

In the presence of E.J.

.....
*Signature*Advocate of (*address*)

or In the presence of GH

.....
Signature

of address and description

an IJ.....

Signature

of addressed and description

(SAMPLE OF A GRANT)

Form 47(b)

Para 14 5th Schedule*Limited Grant of letters of Administration ad litem*

Be it known that letters of administration *ad litem* of all the estate of the above named AB, late of who died domiciled in (*state where*) on the2000, which devolves to and vests in his personal representative but limited to the purpose only for filing suit (or as representative in suit (state court and number)).

Issued (*as in Form 41*).

I would propose the above forms to be used.

Nonetheless as a general rule, a person entitled to a grant should not apply for a limited grant but a full grant.

The other issue is whether or not limited grant should be gazetted

Mr. Kaburu argued that all grants must be gazetted. Section 67(1) was clear on the issue of publication. The only exception are grants limited *ad colligenda bona*.

There has been recommendations from the committee looking into the establishment of the Family Court that all limited grants be gazetted. That there must be consent from all the beneficiaries for making of such grants.

I believe that gazettelement of limited grant should be recommended and dealt with by the rules committee. I also believe that limited grant should not issue unless it is under such special circumstances as to allow it to be so issued at the discretion of the court.

As stated earlier full grants should always be applied for in order to limit duplicity of grants unless otherwise stated.

In conclusion I hold the following:

- a) That the procedure in coming to court by limited grant be by way of petition and affidavit. That the procedure be administratively done.

It is recommended to the rules committee, that the consent of all concerned be obtained and that the committee look into the issue of gazetting limited grants.

- b) That there are two categories of types of grants.

I) Limited grant under section 54; 5th Schedule

- i) Grant in duration
- ii) Grant of the use and benefit of others having rights
- iii) Grant for special purpose
- iv) Grant with exemption

For ease of clarification grant for special purpose, paragraph 14 of the 5th Schedule is the grant *ad litem* for filing suit.

Grant for use of the benefit of others includes grant of administration *pendete lite* (paragraph 11).

II) Limited Grant

- i) *Ad colligenda bona*
- ii) *Ad colligenda bona defuncti*
- iii) Grants *ad colligenda bona* as per the Law of Succession

by Anthony R. Mellow's 2nd Ed London Butterworth 1973.

“This grant is intended to give the administrator power only to get in the estate of the deceased, and to do such acts as are necessary in order to preserve it, and it is usually limited in this way. A grant in these terms does not give a power to invest money collected in, nor to sell the assets even where a sale is necessary because the assets is wasting. It is anticipated that powers in this nature will be required, they may be expressly included in the grant upon application being made to the court.”

Ad colligenda bona defuncti

For purpose of collecting the deceased goods.

III) Forms

The correct forms of petition to use are:

- i) Grant for special purposes

Modified forms duly adapted as near as possible to form P & A 90 and to form P & A 19 as read with rule 12.

Form 47 as modified above to issue for the letters of administration *ad litem*.

- ii) Grant *ad collicienda bona*

Petition form P & A 85 and P & A 19 as read with rule 12. The grant be issued on form P & A 47 as prescribed.

Recommendations

- i) It is the rules committee under section 97 that is empowered to make such rules as outlined in that section.

- ii) It is the Chief Justice under rule 70 who would prescribe the type of new forms to be used.

Nonetheless parties are permitted to adapt and modify the forms to suit their circumstances.

I have before me the various files as per the annexed schedule. I hereby struck out all the applications and petitions filed for purposes of filing suit as being defective in form with no orders as to costs.

Leave be and is hereby granted for a fresh application to be filed.

I thank the advocates for their most invaluable submissions on this point.

Dated this 30th day of November, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE

**In the Matter of the Estate of the Late Simon
Timaiyo Mokosio also known as Simon Nemo-
kosio (Deceased)**

REPUBLIC OF KENYA

In the High Court of Kenya at Nairobi

Succession Cause No. 1063 of 1987

RECTIFICATION OF GRANT

1. Section 74
Law of Succession Act Cap. 160
2. Rule 14(1) Probate & Administration rules
3. Rule 43 Probate &- Administration rules
4. Order 44 Civil Procedure Titles as read with rule 63 of the Probate
& Administration rules

INHERENT JURISDICTION

5. Rule 73
6. Rule 49

RULING

On a point of law section 74, rule 43 and rule 14(1) of the Law of Succession Act and the Probate & Administration rules (note reference to title ...Act rules refer to the Law of Succession and the Probate & Administration rules).

This ruling has come about as a result of several advocates coming to the Probate and Administration Court to apply for the rectification of their respective clients' grants. In each case I noted that they relied on rule 49 and rule 73 respectively namely rule 49- deals with applications not otherwise provided for-

“a person desiring to make an application to the court relating to the estate of the deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

Rule 73 – deals with “the saving of inherent powers of court namely:

“nothing in these Rules shall limit otherwise or effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

It was agreed amongst the said seven advocates that they would submit to this court on a point of law, on how one should apply for the rectification of the grant, the law and the procedure of coming into court. I outline the issues to be considered but not necessarily in the order raised:-

Issues on rectification of grant

1. Can the inherent jurisdiction of the court be invoked under rule 49 and 73 where the order sought are not specifically provided for in the rules e.g amendment of the certificate of grant?
2. Can the inherent jurisdiction of the court be invoked under rule 73 even where specific procedure has been provided for in the rules?
3. What is the jurisdiction between rules 43 and rule 14 (1)?
4. What is the scope of rule 43 of P & A rules in respect of rectification of an error in the certificate of confirmation of grant?
5. Is there any difference between rectification of the grant itself and the rectification of the certificate of confirmation of grant as far as the procedures for correction is concerned?
- 6) What is the scope of section 74?

(B) Definition

What is the meaning of rectification?

According to the *Black's Law Dictionary*, 5th Edition Rectify means:

“To correct or define something which is erroneous or doubtful. Thus, where the parties to an agreement have determined to embody its terms in the appropriate and conclusive form, but the instrument meant to effect this purpose (e.g. a conveyance settlement etc.) is by mutual mistake so framed as not to express the real intention “of the parties, an action may be brought to have it rectified)”

Rectification means:

“The act or process by which something is made right or by which a wrong is adjusted”.

Alter:

“To make a change in; to modify to... in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroy the identity of the thing effected. To change partially. To change in one or existence or identity of the thing changed; to increase or diminish”.

Alteration:

“Variation; changing, making different. A change of a thing from one form or state to another: making a thing different from what it was without destroying its identity ...”

Amend:

“To improve. To change for the better by removing defects or faults. To change, correct revise.”

Amendment:

“To change or modify for the better. To alter by modification, deletion or addition”.

(C) The Law

Section 74

The main section that governs the application for the rectification of the grant is Section 74.

It reads:

“Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court and the grant of representation whether before or after confirmation, may be altered and amended accordingly”

This section provides for rectification of errors contained in the grant before and after rectification of the grant.

The rules to be followed and applied as to how this is done is rule 43 and rule 14(1).

II Amendment of application for a grant Rule 14(1)

Before a grant is issued, rule 14(1) becomes applicable. This rule deals with the amendment or withdrawal of application for grant.

“Section 14(1)

An applicant for a grant may amend his application before the making of the grant by notice in Form 62 to be filed in the registry in which his original application was filed and serving forthwith a copy of such notice upon every objector who has lodged an objection and cross-application in the matter; and he shall pay to every such objector such costs (if any) as the court may direct.

Provided that where the purposed amendment is of a minor nature the registration may permit the amendment to be made forthwith without notice to any party.”

This rule therefore provides for the amendment of the application of grant and before such grant has been issued.

An applicant wishing to amend his application before the grant is issued must file form P & A 62

FORM 62

[Rule 14(1)]

Notice of Amendment of Application for Grant

(Heading as in Form 1)

TAKE NOTICE that I, CD, of

 having
 applied to this Honourable Court for a grant of representation of the
 above-named AB who died on the, 20
, hereby amend such application in the following manner—(Here
 set out in paragraphs to be numbered consecutively any matters requiring

to be amended in the petition and supporting affidavits by way of deletion, substitution or addition).

AND I HEREBY MAKE OATH AND SAY that what is stated in my original application as so amended is true to the best of my knowledge, information and belief.

Sworn, etc., (*as in Form 2*).

Note—This notice does not require a supporting affidavit.

Therefore a party who now wishes to amend his application before a grant is issued merely gives to the Registrar the notice in Form P & A 62. No affidavit is required. If it is a simple and minor amendment the Registrar amends without notice to parties. If it is a complicated matter notice to any party may be given.

If there are objectors to the proceeding they are required to be served with a copy of such notice.

III Rectification of an error after the grant has been issued

Rule 43 (1, 2 and 3).

Rule 43 of the Probate and Administration rules provides for the rectification of grant and its procedure.

“43(1)

Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or description of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant; the purpose for which the grant was made, he shall apply by summons in form 110 for such rectification through the registry and in the cause in which the grant was issued”.

Rule 43 must be read together with section 74. Section 74 has the identical wording as those found in section 261 of the Indian Succession Act, 1925.

I can therefore safely take its interpretation and the scope the rule and section has. I was referred to the commentary of:

SANJIVA ROW'S Commentary on the Indian Succession Act, Act 39 of 1925 4th Edition; Page 786 paragraph 261.

The major difference with section 74 and section 261 of the Indian Succession Act, 1925 is that the Kenyan section 74 allows for the grant of representation to be rectified.

“whether before or after confirmation”

This I believe is to just bring it in line with the Law of Succession Act Cap. 160 Laws of Kenya.

a) What sort of errors may be rectified?

1. The scope of the rules

Under Section 61 of the Indian Succession Act, 1925, it provides for the rectification of the grant. This section is seen in complementary with their Order 47 of the Civil Procedure Code (India) that applies to the Probate Court by reasons of section 141 of the Civil Procedure Code (India).

If we look at the Kenyan Act, section 74 allows for the rectification of grant where there is an error. The procedure is laid out in rule 43. Under rule 63, it provides for the application of the Civil Procedure Rules and High Court (Practice and Procedure) was that both are applicable to the Act.

Order 44 (now Order 45) of the Civil Procedure Rules is one such Order that deals with review which is also application to the Act.

Order 44 (now Order 45) for review, as stated is complementary to rule 43 and should enable a party to seek rectification of a grant in situations not fully provided under rule 43. It deals with errors apparent on the face of the record.

(a) The errors that may be rectified:

Under section 261 of the Indian Succession Act, the errors and mistakes are of various categories. The categories are based on the

textbook of Probate and Practice 23rd edition 1970 TRISTAM and COOTE'S Probate Practice.

These are:

I) Error in the grant concerning the deceased

- 1) The name of the deceased might have been misspelled.
- 2) The status of the deceased misstated.
- 3) The date of death or the place of death of the deceased."

In Tristam and Coote's Probate and Practice – if the amendment or error is in the surname then the grant should be revoked. If the surname involves a spelling amendment it may be allowed. If the first name or Christian name is wrong, the grant should be revoked. Where the first name used is correct but the spelling incorrect then the amendment may be allowed. For example "Ann" and "Anne", "Sussanna" and "Sussannah."

II) Errors in the grant

1. "Limited grants may have a misdescription of the property to be administered.
2. Misrecital of the power under which the will had been made or of a deed by which a trust has been created.

III) Errors as to Testators

1. Alteration and description in names can be made in regard to testators, executors and or administrators.

IV) Others

1. Errors in the inclusion of execution of settled land.
2. Official errors.
3. Error in description or character in which a person applied for a grant.

(D) Procedure to Rectification of a Grant

I had earlier outlined the procedure of applying for an error to be rectified under rule 14(1). This is where no grant has been issued but there is a pending application for such grant. The procedure is administrative unless otherwise directed.

The procedure under rule 43 is covered in its sub-rules (1), (2) and (3). The applicant will first apply by summons in form 110.

FORM 110

[Rule 43(1)]

*Summons for Rectification of Grant**(Heading as in Form 1)*

LET ALL PARTIES CONCERNED (*continue as in Form 104*) on the hearing of an application on the part of CD the executor of the last will (and codicil) (or the administrator of the estate) of the above-named AB who died on the, 20, for orders:—

1. That the grant of probate (or letters of administration) issued to the said CD in this matter on the, 20, be rectified in the following respects as provided for by Rule 43 (1) of the Probate and Administration Rules (*set out in full the desired rectification*).
2. That the costs of this application shall be provided for.

Which application (*continue as in Form 104*).

Dated }
 Issued } (*As in Form 104*).

Address for service (*as in Form 2*).

This summons must be filed with an affidavit in Form P & A 13. The Registrar may dispense with the filing of the affidavit. If he does not, the affidavit must contain such information as is necessary to enable the court to deal with the matter. The affidavit is deposed by the applicant.

FORM 13

[Rule 43(2)]

*Affidavit in Support of Summons for Rectification of Grant
(Heading as in Form 1)*

I, CD, of (as in Form 2) the executor of the last will dated the , 20 (and the codicil thereto dated the , 20) (or the administrator of the estate) of the above-named AB make oath and say as follows:—

1. A grant of probate of the said will (and codicil) (or of letters of administration (with the will (and codicil) annexed) was made to me by this Honourable Court on the , 20
 2. The said grant contains errors as to (set out the errors capable of rectification under rule 43(1))
.....
.....
 3. The said grant has not been confirmed (or was confirmed on the , 20)
 4. It is desirable that the above errors be rectified by the court.
 5. The facts herein deposed (continue as in Form 2).
- Sworn, etc., (as in Form 2).

The Registrar is thereafter to cause the summons and the affidavit (if any) to be laid before the court without delay. The court may either grant the application without attendance of any person or direct that the application be set down for hearing on notice to the applicant and to such other persons (if any) as the court shall think fit".

This means that the applications for summons for rectification of grant is also dealt with administratively. The parties need not attend court. Once the application is made, the Registrar places the file before the court. It is through the court under its own discretion who would direct that the applicant attend before him and any persons on notice to them to appear and address the court on such application.

(E) What is the difference between Rectification of the Grant itself and the Rectification of the Certificate

“Grant” means a grant of representation, whether a grant of probate or of letter of administration with or without a will annexed to the estate of a deceased person (see rule 2).

Where a grant is directed to be confirmed under rule 41(5) as read under section 71(2) a certificate of confirmation is issued. Form P & A 54 is then issued to be affixed to the grant.

The effect of this is that the documents constitute a confirmed grant. I would accept the argument that the provision in respect of rectification of the grant apply equally to whether the grant is issued and not confirmed and to where a grant is issued and is confirmed.

(F) Can the Inherent Jurisdiction of the court be invoked under rule 49 and 73 where orders sought are but specifically provided for in the rules?

From the submissions so far, it is clear that there is provision under the Law of Succession Act Cap. 160 to rectify errors on a grant before or after the confirmation of grant.

These provisions we have seen are contained clearly in section 74 and rule 43. Before a grant is issued, rule 14(1) applies.

It has also been illustrated that Order 44 of the Civil Procedure Rules dealing with the review of a grant is also applicable in instances where there is an error on the face of the record.

Sanjiva Row's commentary on the Indian Succession Act discusses this as being complimentary. Namely, the rule on section on rectification of grant is complimentary to Order 44 of the Civil Procedure Rules. It is therefore not necessary to make application under rules 49 and 73 only. I believe that this has been done in the past without realizing that there are provisions available.

I would not accept the arguments and submissions put forward that it can be done. Rule 73 is a discretionary rule to the Judge. It was allowed to be evoked in the case of *Rawal v Mombasa Hardware Ltd.* [1968] EA 392 because the order made was for a dismissal of a case. The three years had expired. However, Order 16, rule 6, the suit

was dismissed without notice. In the interest of Justice, as no notice was required to be given and dismissal made, the Court of Appeal allowed the setting aside of the Orders.

In the application by summons for rectification of grant, it is imperative that the correct law is referred to namely, section 74 as read with rule 43(1) depending on the type of application sort.

If the rules do not specifically provide for it, Order 44 of the Civil Procedure Rules can be invoked as read with rule 63. The other alternative is for the revocation of a grant.

May I thank the advocates who addressed me on the point of law. I am left with giving directions and orders to each file before me. These orders will be given in their respective files.

IN CONCLUSION AND SUMMARY

Rectification of Grant

Rule 14(1)

- (1) On application for a grant and before a grant is issued rule 14 (1) to apply.

Procedure

Notice under Form P & A 62 (no affidavit required) is filed in the original application file.

Where there are objectors, notice to be served on objector.

Where there are none or the amendment is minor, Registrar may permit the amendment without notice to any party.

- (2) Where a grant has been issued with or without a confirmed grant. Section 74 and rule 43 apply.

Procedure

The applicant is to file Form P & A 110 for summons for revocation of grant together with an affidavit or Form P & A 13 (unless exempted by the Registrar).

The application is placed before the court without delay. The court makes orders as to the rectification of grant. However, the court may direct that a notice to the parties including the applicant be issued that they attend before the court on the said application.

The procedure in both cases i.e. whether under rule 14(1) or 43(1) are administratively in the first instance.

Dated this 29th day of January, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE

ADVOCATES

1. Miss W.J. Kamau Instructed by:
M/s Kamau & Kamau Advocates
Succession Cause 728/96
2. Miss Gathaara Instructed by:
M/s J. E. Jamal Advocates
Succession Cause 500/98
3. Mr. C.A. Njuguna Instructed by:
Kibatia & Co. Advocates
Succession Cause 31/97
4. Mr D. K. Mburu Instructed by:
P.M. Ndungu & Co. Advocates
Succession Cause 2473/95
5. J. K. Mwangi Instructed by:
M/s J.K. Mwangi & Co. Advocates
Succession Cause 20/96
6. D. M. Mutia
Mutua Mathiva & Co. Advocates
Succession Cause 283/86
7. G. Oluoch Instructed by:
M/s G.E.O. Oluoch & Co. Advocates
Succession Cause 1063/87
Others Files - Succession Cause 368/98
- Succession Cause 142/191

Rawal v The Mombasa Hardware Ltd

[1968] 1 EA 392

Division: Court of Appeal at Mombasa

Date of judgment: 23 May 1968

Case Number: 10/1968 (89/68)

Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA

Appeal from: The High Court of Kenya – Wicks, J

Civil Practice and Procedure – Dismissal for want of prosecution – By Court of own motion when no step taken for three years – Whether Court has jurisdiction to set aside such dismissal and restore suit – Civil Procedure (Revised) Rules 1948, O. 16, r. 6; Civil Procedure Act, ss. 81 and 97 (K.).

Civil Practice and Procedure – Inherent Jurisdiction – Exclusion of – Whether excluded by express rule – Civil Procedure (Revised) Rules 1948, O. 16, r. 6; Civil Procedure Act, ss. 81 and 97 (K.).

The appellant sued the respondent in 1962. No step was taken in the suit for over three years; and the Court of its own motion and without notice to the parties dismissed the suit under O. 16, r. 6 of the Civil Procedure (Revised) Rules, 1948. The appellant then applied to have this order of dismissal set aside and the suit restored, under section 97 of the Civil Procedure Act. The Court dismissed this application, holding that its inherent jurisdiction under section 97 was excluded by O. 16, r. 6. The appellant appealed.

Held: In the special circumstances of this case the remedy provided for in O. 16, r. 6 (that is, of bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the Court by section 97 of the Civil Procedure Act was for that reason not excluded.

Observations on the exclusion of the inherent jurisdiction by rules providing an express remedy.

Appeal allowed with costs. Case remitted to High Court.

Case referred to:

- (1) *Kanti & Co. v British Traders Insurance Co., Ltd.*, High Court Civil Case No. 314 of 1962 (unreported).

D.D. Doshi and S.N. Mehta for the appellant.

I.T. Inamdar for the respondent.

May 23, 1968. The following *ex tempore* judgments were delivered:

LAW, J.A.: This appeal arises out of a suit filed in Mombasa on 10 April 1962, in the High Court, in which the plaintiff claimed Shs. 9,000/- allegedly due to him in respect of unpaid salary, and a defence was filed on 16 May 1962, denying liability to pay that sum or any other sum. As is not unknown in Mombasa, there was then an interval during which nothing happened. In fact, no action whatsoever was taken in the suit for well over three years. By O. 16, r. 6, in any case not otherwise provided for, in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed. In such a case the plaintiff may, subject to the law of limitation, bring a fresh suit.

On 26 February 1966, the High Court, of its own motion and without notice to the parties, dismissed the suit. Although no step had been taken in the suit during that period the appellant's advocate had, on one occasion, tried to get it set down for hearing by consent with the other side but no application was made to the court. The plaintiff applied to the High Court for the order of dismissal to be set aside and the suit restored. This application was made under section 97 of the Civil Procedure Act and was heard by WICKS, J., who delivered his ruling on 29 January 1967. He held that the court had no jurisdiction to restore the suit, the reason being that in his opinion

O. 16, r. 6, provided its own remedy; that is to say, the bringing of a fresh suit subject to the law of limitation; and that in the circumstances the exercise of the High Court's inherent powers conferred by section 97 of the Civil Procedure Act was excluded. Against that decision of the High Court the plaintiff now appeals, the main ground being that the learned Judge erred in law in holding that he had no jurisdiction to restore the suit. Mr. Doshi, who appeared for the appellant, relies in great measure on an unreported decision of the High Court in *Kanti and Co. v British Traders Insurance Co., Ltd.* (Civil Case No. 314 of 1962) in which a very similar position was considered by RUDD, J. A suit, or several suits, had been dismissed under O. 16, r. 6, without notice to the parties, who then applied for the suits to be restored; and the learned Judge decided that although O. 16, r. 6 provided a remedy he was nevertheless satisfied that there remained an inherent power to set aside the dismissals if the requirements of justice so demanded the exercise of that power, as for instance if limitation rendered the prescribed remedy futile.

Mr. Inamdar, with his usual clarity of expression and persuasiveness, has cited various Indian cases in support of his proposition that where in a rule the procedure to be adopted for a remedy is provided for, the invocation of inherent power to provide an alternative remedy is excluded, except in relation to the procedure laid down in the rule; in other words, the court has no jurisdiction to use its inherent powers to override the express provisions of the law.

I have no reason to doubt that those cases were correctly decided in relation to the provisions of the Indian Code and Rules with which they were concerned. But the provision with which we are concerned, i.e., O. 16, r. 6, is a very special provision which finds no counterpart in India. Mr. Inamdar has referred us to other instances, for instance, under O. 9, in which the remedies open to a party whose suit has been dismissed are laid down. In all those cases the party affected had notice of what was done, in the case now under consideration he had no such notice and that is why O. 16, r. 6, stands in a very special position.

Mr. Inamdar's second submission is that even if the court has a residue of discretion in this case, the court will not exercise its discretion where the effect is to deprive a part of a defence such as the protection of limitation and in that respect again I think that the cases relied on by Mr. Inamdar were not altogether in point having regard to the peculiar position here. The defendant, if the case is restored, is not being deprived of any defence that he originally enjoyed or that he originally pleaded; he is being deprived of what one might call an after-acquired defence which has accrued to him solely through action taken by the court of its own motion of which he was not even aware. I personally consider that in the special circumstances of this case the remedy provided for in rule 6, that is of bringing a fresh suit, was not intended to be exhaustive and that the inherent jurisdiction vested in the court by section 97 of the Civil Procedure Act is for that reason not excluded.

I would allow this appeal and order that the application for the re-institution of the suit be returned to a judge of the High Court for consideration as to whether, in the exercise or the Court's inherent jurisdiction and of his general discretion a case has been made out so as to justify the re-institution of this particular suit and the setting aside of the order for its dismissal.

SIR CLEMENT DE LESTANG, V.-P.: I agree and have nothing to add.

SIR CHARLES NEWBOLD, P.: I also agree; and I would like to state that I agree with every word that LAW, J.A. has said. It may be gilding the lily a bit, but I would like to say one or two more words.

Page 394 of [1968] 1 EA 392

The trial judge held that he had no jurisdiction to hear this matter. Mr. Inamdar has submitted the judge was right because rule 6 of O. 16, has provided the remedy for the situation with which it deals and that in those circumstances the court should not invoke its inherent jurisdiction so as to provide an alternative remedy. In support of that he has referred to a number of Indian cases. Now I think that any rule which purports to take away the inherent jurisdiction of

the courts should be looked at very carefully before it is construed in such a manner. I do not seek to base my decision solely on this, but I should like to refer to the provisions of sub-section 81 and 97 of the Civil Procedure Act. Section 97 reads:

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the needs of justice or to prevent abuse of the process of the court.”

It is, I think, important to consider carefully the obvious intention that nothing in the Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice. What it is sought to do in this case is to say that a provision in the Rules precluded the courts from taking action which may result in preventing injustice; and it is sought to say that this position arises by reason of Rules made under the same Act in which section 97 appears. Section 81, which is the section giving power to make the Rules, says that these Rules shall not be inconsistent with the provisions of the Act. Surely, if one were satisfied that the effect of Rules construed in a particular way would be to result in injustice, then the provisions of section 97 and section 81 clearly show that the Rules should not be construed in such a manner.

Here a suit was dismissed by an informal order of the court made without notice to the parties. We have heard in outline the position which gave rise to the suit and the delay in its prosecution. I think all that need be said at this stage is that it is part of a family quarrel in which the members of a family have shown one to the other that customary amount of love and affection which one expects when there is a dispute within a family. Be that as it may, what we are concerned with construing is whether O. 16, r 6, has taken away the jurisdiction of the court in regard to the control of its own order when to do so may result in injustice. I do not wish to be understood to be saying that it would result in injustice in this case, but the argument applies in every case as it goes to a question of jurisdiction. I do not think that rule 6 should be so construed. I would agree entirely with the very clear and able judgment of RUDD, J. to which my brother LAW, J.A. has already referred as showing that this rule shall be construed in a way which would not take

away the jurisdiction of the court to remedy an injustice should it be satisfied that such an injustice exists. RUDD, J. emphasised that the rule related to an informal order of the court itself. We all know that a court has control over its order until it is perfected. Even if the order is made in the presence of the parties and after argument, it is still open to a court, before it is perfected, to recall the order. Yet here it is urged that rule 6 is to be construed in such a way as to prevent the court from exercising control over its own order made, not only without argument, but, indeed, without even the knowledge of the parties and informally. I cannot accept such a construction.

Turning to the second point urged by Mr. Inamdar, he has urged that, in fact, WICKS, J. exercised his discretion. I regret I cannot accept that. It is true that in the course of his judgment WICKS, J. did say that a court should not take action which would result in defeating the protection of the law of limitation. I consider, however, that those words were spoken in relation to the consideration of the interpretation of the rule and not to whether, in the circumstances of the case, he should exercise discretion. On this matter I should like to agree entirely with what LAW, J.A. has said. This is not a case of taking away a benefit which the defendant had of the protection of the law of limitation. The defendant had no such protection, no such right, at the time that he filed his defence. As my brother has pointed out, this right has come into existence by the action of the court itself.

Page 395 of [1968] 1 EA 392

I think we are all concerned about whether it would not be proper, in order to avoid further costs, to take on the duty of exercising the discretion which the trial judge should have exercised. Nevertheless, both of my brethren, and I also have come to the conclusion that this is a case in which a judge of first instance should himself exercise the discretion of the court. I agree, therefore, with the order proposed by LAW, J.A. Accordingly the appeal is allowed and the matter remitted to a judge of the High Court to consider the application on its merits on the basis that he has jurisdiction so to do.

Appeal allowed with costs. Ruling and order of the court below set aside and the matter remitted to a judge of the High Court. Costs of the court below, both for the original hearing and the subsequent hearing, to be in the discretion of the judge to whom the matter was referred.

Advocates: *Doshi & Chohan, Mombasa* (for the appellant); *Bryson, In-
amdar & Bowyer, Mombasa* (for the respondent).

FORM 1

[Rules 58 and 65]

General Heading and Address for Service

1. GENERAL HEADING

Unless otherwise indicated and subject to the provisions of rule 58 as to litigious proceedings the heading of each form should be as one of the following—

(1) Non-litigious proceedings.

Forms not initiating litigious proceedings or relating to existing proceedings should be headed—

In the Matter of the Estate of AB (full name and alternatives, if any)
Deceased.

(2) Litigious proceedings in the High Court.

Forms initiating or relating to existing proceedings in the High Court should be headed—

In the High Court of Kenya at
Succession Cause No. H.C. of 20
In the Matter of the Estate of CD (*full name and alternatives, if any*)
Deceased.

(3) Litigious proceedings in the Resident Magistrate's Court.

Forms initiating or relating to existing proceedings in the Resident Magistrate's Court should be headed—

In the Resident Magistrate's Court at
Succession Cause No. R.M. of 20
In the Matter of the Estate of EF (*full name and alternatives, if any*)
Deceased.

(4) For applications where there are no litigious proceedings either pending or concluded under the Act see rule 58(1).

2. ADDRESS FOR SERVICE

Except in the case of testamentary instruments every document presented for filing in any registry must bear at foot the name and an address for service within Kenya of the advocate or other person by whom it is so presented together with the name and address of the person on whose behalf it is presented.

FORM 2

[Rule 65]

*Affidavits**Formal Parts**(Heading as in Form 1)*

Opening paragraph—

I, CD, of *(description, true place of abode and postal address)* aged over 18 years *(or if deponent is a minor, his age)* make oath and say as follows—

.....

.....

.....

Concluding paragraph—

The facts herein deposed to are known to me of my personal knowledge save that *(set out any matters falling within the proviso to O. XVIII, r. 3(1) of the Civil Procedure Rule,)*.....

.....

.....Jurat and address for service—

Sworn by the said CD at *(place of swearing)* on this
 20, before me.

.....
Commissioner for Oaths
(or other swearing officer)

Filed by *(name and address for service within Kenya of the advocate or other person by whom it is presented for filing together with the name and address of the person on whose behalf it is presented)*

.....

.....

.....

Note.—As to affidavits generally see the Civil Procedure Rules (Cap. 21, Sub. Leg.) Order XVIII.

FORM 3

[Rule 7]

*Affidavit in Support of Petition for Probate or for Letters of Administration
with Written will Annexed*

(Heading as in Form 1)

I, CD, of *(as in Form 2)* make oath and say as follows:—

1. The full name of the deceased to whose estate the proceedings herein relate is AB (also known as ABC) and I am the petitioner named in the petition herein dated the
....., 20 upon which I have endorsed my name at the time of swearing this affidavit.
2. The deceased died on the20,
at (name of place) as appears from the attached certificate (or photocopy of the certificate) of death (or other document) marked “CD 1” upon which I have written my name at the time of swearing hereof.
3. The deceased was at the date of his death domiciled in
.....(name of country) and his last known place of residence was at (name of place).
4. The deceased died leaving a valid written will dated the
....., 20 (and a codicil thereto dated the 20).
5. I am seeking a grant of representation to the deceased on the grounds that *(state)*
6. The following is a full inventory of all the assets and liabilities of the deceased at the date of his death (including such assets (if any) as have arisen or become known since that date)

Assets—

(Complete as necessary)

Total estimated value Sh.

Liabilities—

(Complete as necessary)

Total estimated value Sh.

7. *If deceased died partially intestate give details of persons related to the deceased as in Form 8 paragraph 3.*
 8. The facts herein deposed (continue as in Form 2).
- Sworn, etc., (as in Form 2).
-

FORM 5

[Rule 7]

*Affidavit in Support of Petition for Letters of Administration Intestate**(Heading as in Form 1)*

I, CD, of *(as in Form 2)* make oath and say as follows:—

- 1.)
 - 2) *(As in Form 3).*
 - 3.)
 4. The deceased died intestate and left the following persons surviving him—
 (names, addresses, marital state and descriptions of all persons related to the deceased in the manner referred to in rule 7(1)(e) (i) together with the information required by rule 7(1)(e)(ii)

 5. I am related to the deceased by reason of being his (state)

 6. *(As in Form 3).*
 7. The facts herein deposed (continue as in Form 2).
- Sworn, etc. *(as in Form 2).*
-

FORM 7

[Rule 42(2)]

*Affidavit in Support of Petition by Personal Representative for Sealing of
Grant Issued in another Country**(Heading as in Form 1)*I, CD, of *(as in Form 2)* make oath and say as follows:—

1. The full names of the deceased to whose estate the proceedings herein relate are AB also known as ABZ.
 2. The deceased died on the
....., 20, at
 3. The deceased was at the date of his death domiciled in
 4. A grant of probate of the last will dated the
....., 20 (and codicil thereto dated the
....., 20) (or of letters of administration with the will (and codicil) annexed or of letters of administration intestate to the estate) of the deceased was issued to me by
.....
(name of issuing court or authority) on *(date)*.
 5. The following is a full inventory of all the assets and liabilities of the deceased in Kenya at the date of his death so far as known to the petitioner—

Assets—

(Complete as necessary)

Total estimated value

Liabilities—

(Complete as necessary)

Total estimated value
 6. No estate duty is payable (or remains unpaid) in Kenya in respect of the said estate.
 7. The facts herein deposed *(continue as in Form 2)*.
- Sworn, etc., *(as in Form 2)*.
-

FORM 8

[Rule 40(1)]

*Affidavit in Support of Summons for Confirmation of Grant of Probate or Letters of Administration with will Annexed**(Heading as in Form 1)*

I, CD, of *(as in Form 2)* the executor of the will of (or the administrator with the will (and codicil) annexed of the estate of) the above-named AB who died on the, 19, make oath and say as follows:—

1. A grant of probate of the last will dated the
....., 20 (and of the
codicil thereto dated the
....., 20) (or letters of administration with the
will (and codicil) annexed) of the deceased was made to me in
this matter on the, 20
 2. The deceased was survived by the following children *(set out
names, addresses and ages)*
.....
.....
 3. The deceased was survived by the following other dependants
*(set out the name, address and age of each of the persons (other than his
children) falling within the provisions of Rule 40(3)(a) and (b), stating the
extent to which each was being maintained by the deceased immediately
prior to his death)*
.....
.....
 4. No application for provision for dependants is pending *(or as the
case may be)*.
 5. No estate duty is payable (or remains unpaid) in respect of the
estate of the deceased and I refer to an estate duty compliance
certificate annexed hereto and marked “CD 1”.
 6. *Set out any further necessary facts.*
 7. The facts herein deposed *(continue as in Form 2)*.
- Sworn, etc., *(as in Form 2)*.
-

FORM 9

[Rule 40(1)]

*Affidavit in Support of Summons for Confirmation of Grant of Administration
Intestate**(Heading as in Form 1)*

I, CD, of *(as in Form 2)* the administrator of the estate of AB who died on the, 20 intestate make oath and say as follows:—

1. A grant of letters of administration of the said estate was made to me in this matter on the, 20
 - 2.)
 - 3.) (As in Form 8 paragraphs 2, 3 and 4).
 - 4.)
 5. The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows
(set out the names of the persons and their respective entitlements)
.....
.....
.....
 - 6.)
 - 7.) *(As in Form 8 paragraphs 5, 6 and 7)*
 - 8.)
- Sworn, etc., *(as in Form 2)*.
-

FORM 10

[Rule 40(6)]

*Affidavit of Protest against Confirmation of Grant***(Heading as in Form 1)*

I, CD, of (*as in Form 2*), in protest against the proposed confirmation of the grant of probate (or letters of administration) made to E.F in this matter on the, 20, make oath and say as follows:—

1. (Set out grounds of protest in full)

2. The facts herein deposed (*continue as in Form 2*).
 Sworn, etc., (*as in Form 2*).

*This affidavit must be filed in the principal registry.

FORM 11

[Rule 29(8)(e)]

*Affidavit of Justification of Proposed Sureties**(Heading as in Form 1)*

We, GH ofand JK ofjointly and severally make oath and say as follows:—

1. We are the proposed sureties on behalf of CD the intended administrator (with will (and codicil) annexed) of the estate of the above-named AB in the sum of Kenya Shillings (KSh.)
 2. I, GH, for myself say that I am, after payment of all my just debts and having taken into account all my liabilities, well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya Shillings(KSh.).
 3. I, JK, for myself say that I am, after payment of all my just debts and having taken into account all my liabilities, well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya Shillings (KSh.).
 4. The facts herein deposed (*continue as in Form 2*).
Sworn, etc., (*as in Form 2*).
-

FORM 12

[Rule 29(2)]

Affidavit of Justification of Proposed Administrator

(Heading as in Form 1)

I, CD, of *(as in Form 2)* having petitioned this Honourable Court for a grant of letters of administration intestate (or with the will (and codicil) annexed) of the estate of the above-named AB who died on the
....., 20, make oath and say as follows:—

1. I am after payment of all my just debts and having taken into account all my liabilities well and truly worth net of such debts and liabilities in immovable and movable assets in Kenya at least the sum of Kenya Shillings
..... (KSh.).
 2. The facts herein deposed *(continue as in Form 2)*.
Sworn, etc., *(as in Form 2)*.
-

FORM 13

[Rule 43(2)]

*Affidavit in Support of Summons for Rectification of Grant**(Heading as in Form 1)*

I, CD, of *(as in Form 2)* the executor of the last will dated the
, 20 (and the codicil thereto dated the
, 20) (or the administrator of the
 estate) of the above-named AB make oath and say as follows:—

1. A grant of probate of the said will (and codicil) (or of letters of
 administration (with the will (and codicil) annexed) was made to
 me by this Honourable Court on the
, 20
2. The said grant contains errors as to *(set out the errors capable of
 rectification under rule 43(1))*

3. The said grant has not been confirmed (or was confirmed on the
, 20)
- 4 It is desirable that the above errors be rectified by the court.
5. The facts herein deposed *(continue as in Form 2)*.
 Sworn, etc., *(as in Form 2)*.

FORM 14

[Rule 44(2)]

*Affidavit in Support of Summons for the Revocation or Annulment of Grant**(Heading as in Form 1)*

I, CD, of *(as in Form 2)*, the applicant herein, make oath and say as follows:—

1. The above-named AB died on the
, 20, and a grant of probate
 (or letters of administration intestate or with the will (and codicil)
 of the said A.B. annexed) was made to *(name and address)*

 by this Honourable Court on the,
 20
2. The said grant was *(set out in detail the facts relied upon as bringing
 the matter within section 76 of the Act)*

3. (State whether the grant was confirmed and the extent to which
 and by whom the estate has been administered, the relationship
 of the applicant to the deceased, the applicant's degree of priority
 in seeking a fresh grant, and any other material facts)

4. The facts herein deposed *(continue as in Form 2)*.
 Sworn, etc., *(as in Form 2)*.

FORM 14A

[Rule 48(3)]

*Affidavit in Support of Petition for Revocation of Probate of a Will and Issue
of New Probate of the Same Will and a Codicil Thereto
Discovered Since the Grant**

(Heading as in Form 1 but in the cause in which probate was issued)

I, CD, (as in Form 2) make oath and say as follows:—

1. The above-named AB died on the.....
....., 20.....
and a grant of probate of his will (or of his will and codicil(s))
was made in this cause to (name and address) by this Honourable
Court on the....., 20
 2. (State whether the grant was confirmed and the extent to which
and by whom the estate has been administered).
 3. Subsequently to the date of the said grant a codicil to the will
of the deceased was discovered by (name) at (place) (state the
circumstances which rendered it impossible for the codicil to be
included with the will in the original application for probate and
any other material facts rendering inclusion of the codicil in the
existing probate impossible).
 4. For the reasons set out in the preceding paragraph it was not
possible to submit the said codicil for proof together with the
will.
 5. I identify the codicil attached to the petition to be filed herewith
as the original codicil referred to in paragraphs 3 and 4 hereof.
 6. The facts herein deposed (*continue as in Form 2*).
- Sworn, etc. (*as in Form 2*).

* This form should be used only when the applicant is not a proving executor of the will: section 61(2) of the Act.

FORM 15

[Rule 45(2)]

*Affidavit in Support of Petition by Dependant under Section 26 of the Act**(Heading as in Form 1)*I, CD, of *(as in Form 2)* make oath and say as follows:—

- 1.)
- 2.) *(As in Form 3 paragraphs 1 to 3).*
- 3.)
4. The deceased died intestate (or leaving a valid will) *(continue as in Form 3 paragraph 4).*
5. No grant of representation to the estate of the deceased has been applied for.
6. My relationship to the deceased is as follows *(state in full)*:
.....
.....
7. The grounds upon which, having regard to the provisions of section 29 of the Law of Succession Act, I claim to have been a dependant of the said AB at the time of his death are as follows *(state in full)* (a):
.....
.....
8. The only other persons who were dependent upon the said AB at the time of his death are *(set out names and addresses in full including persons who have died subsequently to the death of the deceased)* (a):
.....
.....
9. The said AB made the following gifts in contemplation of his death *(set out names and addresses of donees together with the nature, amount and value of each gift)* (b):
.....
.....
10. The property of the deceased at date of death was *(set out in full, stating the nature and amount thereof)* (c):
.....
.....
.....
.....

11. I believe that the value of the deceased's net estate after payment of reasonable funeral expenses, debts and liabilities, the expenses of raising representation to his estate, other reasonable expenses of administration and estate duty (if any) will be approximately Sh. *(state estimated figure)*.
12. My present capital assets consist of the following *(set out in full)*:
.....
.....
13. In addition to my said capital assets I have from time to time received the following items of capital which are no longer in existence or available to me *(set out in full)*:.....
.....
.....
14. I anticipate that I may in the future receive the following capital assets *(set out in full with a statement of the source and anticipated date of receipt and of expected gross and net income therefrom)*:
.....
.....
.....
15. My present annual income is *(state)* consisting of *(state)* and my probable future income and means are *(set out)*:.....
.....
.....
16. My present needs are *(set out in full)*, and my anticipated future needs are *(set out in full)*:.....
.....
.....
17. The deceased during his lifetime made the following and no other gifts to me *(set out in full)*:.....
.....
.....
18. My conduct in relation to the deceased during his lifetime consisted principally of *(set out in general terms)*:
.....
.....
.....
19. The situation and circumstances of the deceased's other dependants, so far as known to me, are as follows *(set out)*:.....

-

 20. The situation and circumstances, so far as known to me, of each of the persons named as beneficiaries in the will (and codicil) of the deceased referred to in paragraph 4 above are as follows (*set out*):.....

 21. I do not know why the deceased made no (or no sufficient) provision for me (or The reason why the deceased did not make the provision for me which I now seek is) (*state fully if known*):

 22. The facts herein deposed (*continue as in Form 2*).

Sworn, etc., (*as in Form 2*).

Notes:—

- (a) For the meaning of “dependant” see section 29 of the Act.
 - (b) For the meaning of a “gift in contemplation of death” see section 31 of the Act. Such gifts fall within section 26 of the Act.
 - (c) The information indicated in paragraphs 10 to 21 (inclusive) is required by section 28 of the Act.
-

FORM 16

[Rule 45(2)]

*Affidavit in Support of Summons under Section 26 of the Act**(Heading as in Form 1)*

I, CD *(continue as in Form 2)*.....
make oath and say as follows:—

- 1.)
- 2.) *(As in Form 3 paragraphs 1 to 3).*
- 3.)
4. *(As in Form 15 paragraph 4).*
5. A grant of representation to the estate of the deceased was applied for by..... *(name and address)* to this court on the....., 20....., but such grant had not yet been made or confirmed*.
- 6.)
- to) *(As in Form 15 paragraph 6 to 21).*
- 21.)
22. The facts herein deposed *(continue as in Form 2).*

Sworn, etc., *(as in Form 2).*

*If grant made but not confirmed delete the words “made or”.

FORM 17

[Rule 46(1)]

*Affidavit in Support of Summons by a Child of the Deceased
(or, if a Minor, his Representative) under Section 35(3) of the Act*

(Heading as in Form 1)

I, CD, of (as in Form 2) (or EF of (as in Form 2) acting for and on behalf of GH a minor) (hereinafter called “the applicant”) make oath and say as follows:—

- 1.)
- 2.) *(As in Form 3 paragraphs 1 to 3.)*
- 3.)
4. The deceased died intestate and letters of administration were granted to..... *(name and address)* on
..... *(date)*
- *5. The deceased left surviving him one spouse only *(name)*.....
.....*(herein called “the surviving spouse”)* and the following child (children) only *(names)*:
.....
.....
- *5A. The deceased having married more than once under a system of law permitting polygamy left surviving him several spouses one of which includes the applicant’s mother (herein called “the surviving spouse”) and the following child (children) only *(names)*
.....
.....
.....
6. The power of appointment conferred by section 35 (2) of the Law of Succession Act upon the surviving spouse has not been exercised (or has been exercised by the appointment of) *(state manner and in whose favour)*:
.....
.....
7. I consider that the action of the surviving spouse in not making an appointment constituted an improper and unreasonable withholding (or in so exercising the power of appointment constituted an improper and unreasonable exercise) of the statutory power in that behalf and I seek (on behalf of the minor applicant) an order to the following effect, namely *(set out)*:

-
-
8. The property of the deceased at date of death was (*set out in full stating the nature and amount thereof*):
-
-
9. The present capital assets of the surviving spouse and of the applicant respectively are (*set out in full*):
-
-
10. In addition to the said capital assets the surviving spouse and I (or the minor applicant) respectively received the following items of capital which are no longer in existence or available (*set out in full*):
-
-
11. I anticipate that the surviving spouse and I (or the minor applicant) respectively may in the future receive the following capital assets (*set out in full with a statement of the source and the anticipated date of receipt and of the expected gross and net income therefrom*):
-
-
12. The present and anticipated future annual incomes of the surviving spouse and of myself (or the minor applicant) respectively are (*state*):consisting of (*state*)
-
13. The present and anticipated future needs of the surviving spouse and of myself (or the minor applicant) respectively are (*set out in full*):.....
-
-
14. The deceased made no advancement or other gift to me (or the minor applicant) in his lifetime or by will (or the only gifts made to me (or the minor applicant) by the deceased by way of advancement during his lifetime or by will are as follows (*state*)):
-
-
15. My (or the minor applicant's) conduct in relation to the surviving spouse and to the deceased respectively consisted

principally of (*set out in general terms so far as relevant*):

.....
.....
.....

16. The situation and circumstance of each other person who has a vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under any will of his so far as known to me are (*state*):.....

.....
.....

17. The surviving spouse's reasons for so withholding (or exercising) the said power of appointment are not known to me (or the minor applicant) (or so far as known to me (or the minor applicant) (*state*)):.....

.....
.....

18. The facts herein deposed (*continue as in Form 2*).

Sworn, etc., (*as in Form 2*).

*Delete either para. 5 or para. 5A as appropriate.

FORM 19

[Rule 12]

*Affidavit in Support of Petition for Limited Grant under the Fifth Schedule to the Act (General Form)**(Heading as in Form 1)*

I, CD, of *(as in Form 2)*
 make oath and say as follows:—

1. The full name of the deceased to whose estate the proceedings herein relate is AB (also known as ABC) and I am the petitioner named in the petition dated the
,²⁰, upon which I have endorsed my name at the time of swearing this affidavit.

2 to 7. The deceased (continue as in Form 3 paragraphs 2 to 7).

8. In addition I state as follows:—

*(a)**(b) Here set out any particular matters which require to be specified.**(c)**(d)*

9. The facts herein deposed *(continue as in Form 2)*.

Sworn, etc., *(as in Form 2)*.

Note.—This form, appropriately adapted, may be used in support of the petitions at Forms 83, 86–91 and 93–95.

FORM 28

[Rule 15(2)]

*Caveat**(Heading as in Form 1)*To *(name and address of registry)*:

.....

LET nothing be done in the estate of the above-named AB who
 died on the, 20,
 without notice to KL of *(postal address)*

.....

and whose address for service is *(state)*:

.....

Dated the, 20

.....

*Caveator/Advocate for Caveator*Filed by *(as in Form 2)*.

Note—This form if not completed and signed in the registry must be
 sent to the registry in duplicate and be accompanied by the prescribed fee.

FORM 31

[Rule 21]

*Citation to Accept or Refuse Probate**(Heading as in Form 1)*To: EF of *(address and description)*

.....

WHEREAS it appears by the affidavit of CD of *(address and description)* sworn on the, 20, that the above-named AB of *(address)* died on the
, 20, having made and duly executed his last will dated the, 20
 (and a codicil thereto dated the
, 20), wherein he appointed you the said EF to be sole executor thereof but did not name therein any residuary legatee *(or as the case may be)*:

AND WHEREAS it further appears by the said affidavit that the said deceased died without leaving him surviving any spouse, issue or parent and that the said CD is the lawful brother of the deceased and one of the persons entitled to share in his undisposed of estate:

NOW this is to direct that you the said EF within fifteen days after service hereof on you (inclusive of the day of such service) do cause an appearance to be entered for you either in the principal registry or in the Mombasa registry and accept or refuse probate of the said will (and codicil) or show cause why letters of administration with the said will (and codicil) annexed of all the estate which by law devolves to and vests in the personal representative of the deceased should not be granted to the said CD.

AND TAKE NOTICE that in default of your so appearing and accepting and extracting probate of the said will (and codicil) this court may proceed to grant letters of administration with the said will (and codicil) annexed of the said estate to the said CD, your absence notwithstanding.

Dated the, 20

Extracted by—

District Registrar

CD (or his advocate) (address)

FORM 32

[Rule 21]

*Citation to Accept or Refuse Letters of Administration Intestate**(Heading as in Form 1)*To. EF of *(address and description)*

.....

WHEREAS it appears by the affidavit of CD
 sworn on the
, 20, that the above-named AB of *(address)*
 died on the
, 20, intestate leaving you the said EF his
(state relationship to deceased) and one of the persons entitled to share in his
 estate.

AND WHEREAS it further appears by the said affidavit that the said
 CD is (set out relationship to the deceased) and also one of the persons
 entitled to share in his estate:

NOW this is to direct that you the said EF do within fifteen days
 after service hereof on you (inclusive of the date of such service) cause an
 appearance to be entered for you either in the principal registry or in the
 Mombasa registry and accept or refuse letters of administration of all the
 estate which by law devolves to and vests in the personal representative of
 the deceased or show cause why the same should not be granted to the
 said CD:

AND TAKE NOTICE that in default of your so appearing and
 accepting and extracting letters of administration this court may proceed
 to grant letters of administration of the said estate to the said CD, your
 absence notwithstanding.

Dated the, 20

.....

District Registrar

Extracted by—

CD (or his advocate) *(address)*

FORM 36

[Rule 21]

*Citation by Creditor where Deceased had no known Relatives**(Heading as in Form 1)*

To: The relatives (if any) who are entitled to share and all other persons having or claiming any interest in the above estate:

WHEREAS it appears by the affidavit of CD sworn on the
, 20, that the above-named AB died on the
, 20, intestate leaving him surviving no
 spouse, issue, parent, brother or sister of the whole or half blood or any
 known relative of remoter consanguinity and that the said CD is a creditor
 of the said deceased (*or as the case may be*):

Now this is to direct that within* days after service
 hereof on you by publication (inclusive of the day of such service) you do
 cause an appearance to be entered for you either in the principal registry or
 in the Mombasa registry and accept or refuse letters of administration of all
 the estate which by law devolves to and vests in the personal representative
 of the said deceased or show cause why the same should not be granted to
 the said CD.

AND TAKE NOTICE that in default of your so appearing and
 accepting and extracting letters of administration as aforesaid this court
 may proceed to grant letters of administration of the said estate to the said
 CD your absence notwithstanding.

Dated the, 20

.....
District Registrar

Extracted by—

CD (*or his advocate*) (*address*)

* Where the deceased had no known relatives the period fixed is
 normally not less than 42 days.

FORM 37
[Rule 40(8)]

Consent to Confirmation of Grant (General Form)

(Heading as in Form 1)

I, EF, of
.....
.....a dependant within the meaning of
section 29 of the Law of Succession Act of the above-named AB (or a
person who might be beneficially entitled to participate in the estate of the
above-named AB) who died on the, 20,
do hereby consent to confirmation of the grant of probate (or letters of
administration) made to CD by this Honourable Court on the
....., 20

Dated the, 20

Signed by the said }
EF in the presence }
of }

FORM 38
[Rule 26(2)]

*Consent to the Making of a Grant of Administration Intestate to Person of
Equal or Lesser Priority*

(Heading as in Form 1)

WHEREAS the above-named AB of
.....
.....died on the
.., 20, intestate and representation has not been raised to his estate:

AND WHEREAS I, CD, am entitled to apply for letters of
administration to the estate of the said AB in equality with or priority
to EF of *(address and description)*but
nevertheless am agreeable to the said EF so applying:

Now I, the said CD, of *(address and description)*
.....do hereby consent to letters of administration to the estate of
the said deceased being granted to the said EF

Dated the, 20

Signed by the said
CD in the presence }
of

FORM 41

[Rule 25]

*Grant of Letters of Administration Intestate**(Heading as in Form 1)*

BE IT KNOWN that on the
, 20, letters of administration intestate of all
 the estate of
 (also known as.....) deceased late of
 who died domiciled in (*state where*)
 ... on the, 20, at
 which by law devolves to and vests in his (her) personal representative were
 granted by this court to of
 (and of) he
 (they) having undertaken faithfully to administer such estate according to
 law and to render a just and true account thereof whenever required by
 law so to do.

Issued by the High Court/Resident Magistrate's Court/through the
 registry at this.....
, 20

(Signature).....

Judge of the High Court/Resident Magistrate

Note—This grant when confirmed must specify all the persons
 beneficially entitled to the estate together with their respective shares:
 section 71 (2) (proviso) of the Act. This will take the form of a Schedule
 at foot or appended and will include any beneficiaries dying prior to
 confirmation of the grant.

FORM 43

[Rule 25]

*Grant of Letters of Administration with Written Will Annexed**(Heading as in Form 1)*

BE IT KNOWN that on the
, 20letters of administration with will
 (and codicil(s)) annexed of all the estate of AB (also known as ABC)
 deceased late of who died domiciled in
 (state where)on the
 20, at which by law devolves to and vests in his
 (her) personal representative, a copy of which will (and codicil(s)) is hereto
 annexed, were granted by this court to.....
 of he (she) having
 undertaken faithfully to administer such estate according to law and to
 render a just and true account thereof whenever required by law so to do.

Issued (*as in Form 41*).

FORM 44

[Rule 25]

*Grant of Probate of Oral Will**(Heading as in Form 1)*

BE IT KNOWN that on the
....., 20, the last oral will of AB (also known as ABC)
late of who died domiciled in
..... on the
....., 20....., the terms of which will were recorded in writing and are
hereto annexed, was proved in this court and that administration of all the
estate of the deceased which by law devolves to and vests in his personal
representative was granted to (*name*) the executor(s) named in the said will,
he (they) having undertaken faithfully to administer such estate according
to law and to render a just and true account thereof whenever required by
law so to do.

Issued (*as in Form 41*).

FORM 45

[Rule 25]

*Grant of Probate of Written Will**(Heading as in Form 1)*

BE IT KNOWN that on the
, 20, the last written will (with codicil(s)) of AB
 (also known as ABC) deceased late of
 who died domiciled in (*state where*) on the
, 20, at
 a copy of which will (and codicil(s)) is hereto annexed, was proved in this
 court and that administration of all the estate of the deceased which by law
 devolves to and vests in his personal representative was granted to
 of (and
 of) the executor(s) named in the
 said will (and codicil(s)) he (they) having undertaken faithfully to administer
 such estate according to law and to render a just and true account thereof
 whenever required by law so to do.

Issued (*as in Form 41*).

FORM 47

[Rule 36(2)]

Limited Grant of Letters of Administration AD Colligenda Bona under Section 67(1) of the Act

BE IT KNOWN that letters of administration *ad colligenda bona* of all the estate of the above-named AB, late of who died domiciled in (*state where*) on the, 20, which by law devolves to and vests in his personal representative but limited to the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted were granted by this court to CD of he having undertaken faithfully to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law so to do.

Issued (*as in Form 41*).

FORM 57

[Rule 29(5)]

*Guarantee by Personal Sureties (General Form)**(Heading as in Form 1)*

WHEREAS the above-named AB of
died on the
, 20, and CD (hereinafter called “the administrator”) is the
 intended administrator of his estate:

Now WE, GH of and IJ of ...
hereby jointly and severally guarantee and
 agree as follows—

1. We will when lawfully required to do so make good any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of the breach by the administrator of his duty—
 - (a) to collect and get in the estate of the deceased and administer it according to law;
 - (b) when required to do so by the court to exhibit on oath in court a full inventory of the said estate and when so required to render an account of the estate; and
 - (c) when so required by the court to deliver up the grant to the court.
2. The giving of time to the administrator or any other forbearance or indulgence shall not in any way affect our liability under this guarantee.
3. The liability under this guarantee shall be continuing and shall be for the whole amount of the loss mentioned in paragraph 1 above save that our aggregate total liability shall not in any event exceed the sum of Kenya Shillings
 (KSh).

Dated the, 20

Signed, sealed and delivered }
by the above-named GH and }
IJ in the presence of-

.....
Commissioner for Oaths/Mag-

istrate

Filed by—(*as in Form 2*).

FORM 61
[Rule 17(4)]

Notice by Registry of Objection to Application for Grant

(Heading as in Form 1)

To: CD (Petitioner)

.....
.....
.....

TAKE NOTICE that an objection was lodged in this registry in the above cause on the, 20, by KL, whose address for service is and that a copy of the said objection is forwarded herewith.

Dated the, 20

.....
District Registrar

FORM 62
[Rule 14(1)]

Notice of Amendment of Application for Grant

(Heading as in Form 1)

TAKENOTICE that I, CD, of.....

.....having applied
to this Honourable Court for a grant of representation of the above-named
AB who died on the, 20, hereby
amend such application in the following manner—*(Here set out in paragraphs
to be numbered consecutively any matters requiring to be amended in the petition
and supporting affidavits by way of deletion, substitution or addition).*

AND I HEREBY MAKE OATH AND SAY that what is stated in
my original application as so amended is true to the best of my knowledge,
information and belief.

Sworn, etc., *(as in Form 2)*.

Note—This notice does not require a supporting affidavit.

FORM 64

[Rule 17(9)]

*Notice of Withdrawal of Answer and Cross-Application**(Heading as in Form 1)*To: *(Name of registry)*

.....

TAKE NOTICE that the answer and petition by way of cross application filed in the above cause on the, 20, by me, KL, of (address) are hereby withdrawn.

Dated the, 20

.....

*Objector/Advocate for Objector*Filed by—*(as in Form 2)*.

FORM 67
[Rule 17(5)]

Notice by Registry to Objector to Application for Grant

(Heading as in Form 1)

To: KL of

whose address for service is

TAKE NOTICE that having lodged in this registry an objection to a grant of representation being made to the estate of the above-named AB you are required withindays from the date hereof (inclusive of such date) to file an answer in the prescribed form to the application for such grant together with a petition and supporting affidavit by way of cross-application for a grant of representation to yourself.

AND FURTHER TAKE NOTICE that in default of your so doing within the time limited a grant may be so made in this cause notwithstanding your objection.

Dated the, 20

.....

District Registrar

FORM 68
[Rule 44(3)]

Notice of Application to High Court for Revocation or Annulment of Grant

(Heading as in Form 1)

To: *(Name, address and description (if known) of person being notified):*

.....
.....
.....

TAKE NOTICE that an application by summons praying for the revocation (or annulment) of the grant of representation issued to CD in this cause having been filed, and directions having been given by this court for service of such summons and supporting affidavit, and such service upon you having been directed, I attach hereto a copy of the summons and affidavit and notify you that you are at liberty before the determination of the application to file an affidavit herein stating whether you support or oppose the application, giving your grounds.

AND TAKE NOTICE that you are invited to attend the Judge in Chambers on the, 20, at o'clock in the noon for determination of the application or otherwise as this court sees fit.

AND FURTHER TAKE NOTICE that in default of your so attending such application may be determined by the court your absence notwithstanding.

Dated the, 20

.....
District Registrar

Filed by—*(as in Form 2)*.

FORM 69
[Rule 44(5)]

Notice of Intention of High Court of Its Own Motion to Revoke or Annul a Grant

(Heading as in Form 1)

To: (Name, address and description)

.....
.....
.....

TAKE NOTICE that, pursuant to the powers conferred by section 76 of the Law of Succession Act, this court proposes, subject to such representations as may be made to the contrary, to revoke (or annul) the grant of representation to the estate of the above-named AB made on the, 20, to (name of holder of grant)

THE GROUNDS for the proposed action are (set out in full):

.....
.....
.....

IF YOU WISH to oppose such proposed revocation (or annulment) you may do so by filing within days from this date an affidavit herein stating the grounds of your opposition.

Dated the, 20

.....
Registrar

Note—The jurisdiction conferred by section 76 of the Act cannot be exercised by a resident magistrate: section 48 of the Act.

FORM 70

[Rule 44(3)]

*Notice to Applicant Seeking Revocation or Annulment of Grant***(Heading as in Form 1)*To: *(Name and address of applicant)*

.....

TAKE NOTICE, that having filed a summons praying for revocation (or annulment) of the grant of representation issued to CD in this cause, (or in R.M.C.C. No. of 20..... as the case may be), you are required to attend on the 20....., in Chambers at o'clock in the noon for the giving of directions as to what persons (if any) shall be served by you with a copy of the said summons and of the affidavit in support thereof and as to the manner of effecting service.

AND FURTHER TAKE NOTICE that in default of your so attending such direction may be given your absence notwithstanding.

Dated the, 20

.....
Registrar

*These proceedings must be in the High Court: section 48 of the Act.

FORM 70A

[Rule 48(5)]

*Summons for Directions by Petitioner Seeking Revocation of Probate and Issue of New Probate of Same Will and Codicil Thereto Discovered Since the Grant**(Heading as in the cause in which the probate was issued)*

LET ALL PARTIES CONCERNED attend the Judge/Resident Magistrate in Chambers on, 20, at o'clock in the..... noon for the giving of directions as to which persons (if any) should be served with a copy of the petition herein and of the affidavit(s) in support thereof; and further that the costs of the application be provided for; which application will be grounded upon the affidavit(s) of (name) filed herewith, the nature of the case and the reasons to be offered.

Dated the, 20

.....
Applicant/Advocate for Applicant

Issued the, 20

.....
Registrar

Address for service (*as in Form 2*).

FORM 74

[Rule 40(8)]

*Notice of Registrar's Intention to give Directions Concerning a Protest against Confirmation of Grant**(Heading as in Form 1)*

To: KL of
 whose address for service is—

.....

TAKE NOTICE that your protest against the proposed confirmation of the grant of probate of the will of (or letters of administration to the estate of) the above-named AB made to CD on the
, 20, has been placed before the court for directions to be given at o'clock in the noon on the, 20

AND FURTHER TAKE NOTICE that if you do not attend this court at that time and date such directions may be given notwithstanding your absence.

Dated the, 20

.....
Registrar

FORM 78
[Rules 7 and 13(1)]

Petition for Probate of Written Will or for Proof of Oral Will (a)
(Heading as in Form 1)

I, CD, of *(address and description)*, HEREBY PETITION this Honourable Court for a grant of probate of the last will (and codicil(s)) of the above-named AB:

AND SAY as follows (b):—

1. The said AB died on the 20 at
.....*(state where)* and was domiciled in
.....*(state where)*.
2. The document hereto annexed contains the true and original last written will (and codicil(s)) (or a true and complete record of the last oral will) of the deceased.
3. I am the executor (or one of the executors) named in the said will (and codicil(s)) (and power should be reserved for the other executor(s) named therein to prove) (c).
4. I will faithfully administer according to law all the estate which by law devolves upon and vests in the personal representative of the deceased and I will render a just and true account of such estate whenever required by law so to do and I will when required by this court deliver up thereto the said grant.

Signed by the above-named CD
(Signature)

In the presence of (d) EF,

.....
(Signature)

advocate, of *(address)*

.....
or In the presence of GH

.....
(Signature)
of *(address and description)*

.....
and IJ

.....
(Signature)

of (address and description)

.....

Address for service (as in Form 2).

Notes:

- (a) This form, appropriately adapted, may be used in the case either of a written or an oral will.
- (b) The supporting affidavit (Form 3 or 4) must verify in sufficient detail the contents of paragraphs 1 to 3 of this petition: rule 7(1).
- (c) Delete if not required.
- (d) The petition must be signed by the petitioner in the presence of his advocate or of not less than two other adult witnesses who must also sign and append their full names, addresses and descriptions.

FORM 79

[Rule 7]

*Petition for Letters of Administration with Written Will Annexed**(Heading as in Form 1)*

I, CD, of
 HEREBY PETITION this Honourable Court for a grant of letters of
 administration with will annexed of the estate of the above-named AB
 who died domiciled in (*state where*)on the
, 20:

AND SAY as follows*—

1. The document hereto annexed contains the true and original last will (and codicil(s)) of the deceased (*or an authenticated copy, etc.*)
2. The executor named in the said will is GH of
3. The said executor is dead (or has consented hereto or has renounced his executorship or has been issued with a citation to renounce his executorship or apply for a grant of probate and has not done so).
4. I present this petition in my capacity as (*state*)
5. (*As in Form 78 paragraph 4.*)

Execution (*as in Form 78*).

Address for service (*as in Form 2*).

*The supporting affidavit (Form 3) must verify in sufficient detail the contents of paragraphs 1 to 4 of this petition: rule 7(1).

FORM 80

[Rule 7]

*Petition for Letters of Administration Intestate**(Heading as in Form 1)*

I, CD, of
HEREBY PETITION this Honourable Court for a grant
 of letters of administration intestate of the estate of the above-named AB
 who died on the, 20

AND SAY as follows*—

1. The deceased died intestate domiciled in (state where)

2. I present this petition in my capacity as (state)

3. Every person having an equal or prior right to a grant of
 representation herein has consented hereto (or has renounced
 such right or has been issued with a citation to renounce such
 right and apply for a grant of representation and has not done so).
4. *(As in Form 78 paragraph 4).*

Execution *(as in Form 78)*.

Address for service *(as in Form 2)*.

*The supporting affidavit (Form 5) must verify in sufficient detail the
 contents of paragraphs 1 to 3 of this petition: rule 7(1).

FORM 81

[Rule 42(2)]

*Petition to High Court by Personal Representative for the Sealing of a Grant
Issued in Another Country**(Heading as in Form 1)*

I, CD, of *(address and description)*
HEREBY
 PETITION this Honourable Court for the sealing of a grant of probate
 of the last will dated the, 20
 (or letters of administration with the last will dated the
, 20 (and codicil thereto dated the
 20.....) annexed of the estate or letters of administration intestate
 of the estate) of the above-named AB who died domiciled in *(state where)*
 on the, 20

AND SAY as follows*—

1. The said grant was issued to me by *(name of court or authority
by which the grant was issued)*
 on the, 20
2. The document hereto annexed is the original grant (or a duplicate
of the said grant sealed with the seal of the said court (or authority)
(or a copy of the said grant certified as correct by (or duly on
behalf of) the said court (or authority)).
3. *(As in Form 78 paragraph 4).*

Execution *(as in Form 78)*.Address for service *(as in Form 2)*.

*The supporting affidavit (Form 7) must verify in sufficient detail the
 contents of paragraphs 1 and 2 of this petition: rule 7(1).

FORM 82

[Rule 42(2)]

*Petition to High Court by Attorney of the Personal Representative for the Sealing of a Grant Issued in Another Country**(Heading as in Form 1)*

I, CD, of *(address and description)*
the lawful
 attorney of EF the executor (or administrator) of the above-mentioned
 AB who died on the, 20, domiciled in *(state where)*hereby petition this
 Honourable Court for the sealing of a grant of probate of the last will dated
 the....., 20....., (and codicil dated the
, 20), (or letters of administration with the last
 will dated the, 20, (and codicil
 thereto dated the, 20),
 annexed or letters of administration intestate of the estate) of the above-
 named AB limited until the said EF to whom the said grant was issued as
 hereinafter set out shall apply for and obtain such sealing:

AND SAY as follows*:—

1. The said grant was issued to the said EF of
 by*(name of court or authority by which the grant was issued)*
 on the, 20
2. The document hereto annexed is the original grant (or a duplicate
 of the said grant sealed with the seal of the said court (or authority)
 or a copy of the said grant certified as correct by (or duly on
 behalf of) the said court (or authority)).
3. I will faithfully administer according to law all the estate of the
 deceased which by law devolves to and vests in his personal
 representative for the use and benefit of the said CD limited as
 aforesaid but no further or otherwise and will render a just and
 true account thereof whenever required by law so to do, and I
 will when required by the court to do so deliver up thereto the
 said grant.

Execution *(as in Form 78)*.Address for service *(as in Form 2)*.

*The supporting affidavit (Form 7) must verify in sufficient detail the contents of paragraphs 1 and 2 of this petition and exhibit the original or an authenticated copy of the power of attorney: rule 42.

FORM 85
[Rule 36(3)]

Petition for Letters of Administration ad colligenda bona under Section 67 of the Act

(Heading as in Form 1)

I, CD, of
HEREBY PETITION this Honourable Court for a grant of letters of administration *ad colligenda bona* of the estate of the above-named AB who died domiciled in (*state where*)
..... on the, 20,
limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the same and until further representation be granted:

AND SAY as follows:—

1. I present this petition in my capacity as (*state*)
..... and by reason of the fact that owing to the special circumstances of the case the urgency of the matter as appears from the affidavit filed herewith is so great that it would not be possible for the court to make a full grant to the person who is by law entitled thereto in sufficient time to meet the necessities of the estate of the deceased.
2. (*As in Form 82 paragraph 3*).

Execution (*as in Form 78*).

Address for service (*as in Form 2*).

*The supporting affidavit must verify in sufficient detail the contents of paragraph 1 of this petition: rule 7(1).

FORM 85A
[Fifth Schedule, paragraph 18, Rule 2]

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO..... OF.....
IN THE MATTER OF THE ESTATE OF.....
(DECEASED)

Petition for Special Limited Grant

I,of.....
HEREBY PETITION this Honourable Court for a special grant of letters
of administration of the estate of the above-named.....
who died domiciled inon the,
limited for the purpose of
.....
.....
.....
.....

AND SAY as follows:

1. That I present this petition in my capacity as
and by reason of the fact that owing to the special circumstances
of the case and the urgency of the matter as appears from the
affidavit filed herewith is so great that it would not be possible
for the court to make a full grant in sufficient time to meet the
necessities of the estate of the deceased.
2. That I have no powers to distribute the estate under the grant.
Signed by the above.....

.....
Signature

In the presence of

.....
Advocate Signature and Address

or

In the presence of

.....

Signature and Address

And

.....

Signature and Address

Drawn and filed by:

.....

.....

.....

FORM 86

[Fifth Schedule, paragraph 16, Rules 7 and 12]

*Petition for Letters of Administration Intestate of Assets Unadministered (a)**(Heading as in Form 1)*

I, CD, of
 HEREBY PETITION this Honourable Court for a grant of letters of
 administration *de bonis non* of the estate of the above-named AB who died
 on the, 20limited to that
 part of the said estate remaining unadministered:

AND SAY as follows (b):—

1. The above-named deceased died domiciled in (*state where*)
 intestate and letters of administration to his estate
 were granted by this Honourable Court on the, 20
, to EB of who on the
 ., 20 died leaving part of the said estate unadministered.
2. I present this petition in my capacity as (*state*)
3. (*As in Form 82 paragraph 3*).

Execution (*as in Form 78*).

Address for service (*as in Form 2*).

Notes:

- (a) This is a petition for letters of administration *de bonis non* intestate
 and may be used in the case of an application under paragraph
 16 of the Fifth Schedule of the Act.
- (b) The supporting affidavit (Form 19) must verify in sufficient
 detail the contents of paragraphs 1 and 2 of this petition: rules
 7(1), 12.

FORM 90

[Fifth Schedule, paragraph 10, Rule 12]

*Petition for Letters of Administration pendente lite (a)**(Heading as in Form 1)*

I, CD, of

....HEREBY PETITION this Honourable Court for a grant of letters of administration *pendente lite* of the estate of the above-named AB who died domiciled in (*state where*)on the
, 20, limited to my acting subject to the immediate control of the court and under its direction and without power of distribution of the estate:

AND SAY as follows (b):—

1. There is now pending in this Honourable Court a suit touching and concerning the validity of the will (and codicil) of the deceased (or the obtaining of a grant of letters of administration to the estate of the deceased).
 2. I present this petition in my capacity as (*state*)

 3. (*As in Form 82 paragraph 3*).
- Execution (*as in Form 78*).
- Address for service (*as in Form 2*).

Notes:

- (a) This is a petition under paragraph 10 of the Fifth Schedule to the Act.
 - (b) The supporting affidavit (Form 19) must verify in sufficient detail the contents of paragraphs 1 and 2 of this petition: rules 7(1), 12.
-

Form 90(B)
(5th Schedule para 14, r12)

Petition for letters of administration where there is a will petition for grant of letters ad litem

ad Litem (b)

(Heading as in Form 1)

I CD of
..... Hereby petition this Honourable court for a grant of letters of administration *ad litem* of the estate of the above named AB who died domiciled in (*state where*)..... on the....., 20.....limited to my filing suit (or to approving KL as personal representative for purpose of filing suit and without power of distribution of the estate.

and say as follows:-

- 1) There is now pending in this Honourable court a suit against (the deceased estate, for the deceased estate) being suit No.(*state case number*)
- 2) I present this petition in my capacity as.....
- 3) That a grant of administration *ad litem* do issue limited for the purpose (*of filing suit/defending a suit or representing suit*).
- 4) That I have no powers to distribute an estate under this grant. Signed by the above named ID.....

In the presence of E.J.

.....

Signature

Advocate of (*address*)

or In the presence of GH

.....

Signature

of address and description

an IJ.....

Signature

of addressed and description

FORM 96

[Rule 45.]

*Petition by Dependant under Section 26 of the Act**(Heading as in Form 1)*I, CD (*name, address and description*).....

.....HEREBY PETITION this Honourable Court for an order that such reasonable provision be made for me as a dependant of the above-named AB out of his net estate as this Honourable Court thinks fit:

AND SAY as follows (a):—

1. The above-named AB died testate (intestate) on the
....., 20, at..... domiciled in
(*state where*) but no grant or representation to his estate has been applied for (b).
2. At the date of the death of the deceased I was his wife (*or as the case may be*) (or had been taken into his family as his own) and I was being maintained by him.
3. As a result of the provisions of the last will of the deceased dated the....., 20..... (or the intestacy of the deceased or gifts made by the deceased in contemplation of his death) I have not been adequately provided for and now seek an order for reasonable provision out of his net estate (c).

Execution (*as in Form 78*).Address for service (*as in Form 2*).*Notes:*

- (a) The supporting affidavit (Form 16) must verify in sufficient detail the contents of paragraphs 1 to 3 of this petition: rule 7(1).
 - (b) If a grant has been applied for but not issued the application must be brought by summons (see Form 106).
 - (c) If necessary the petitioner may in the same petition submit a claim on behalf of the children of the deceased.
-

FORM 97
[Rule 48(1)]

Petition for Revocation of Probate of a Will and Issue of a New Probate of the Same Will and a Codicil Thereto Discovered Since the Grant (a)
(Heading as in the cause in which existing probate was issued)

To (name and address of respondent) (b)

I, PQ of (name, address and description).....

HEREBY PETITION this Honourable Court for the revocation of the probate of the will of the above-named AB granted to.....
.....(name) in this cause and *in lieu* thereof for a grant to me of probate of the said will and of a codicil, thereto dated the ..
....., 20

AND SAY as follows:—

1. (As in Form 78 paragraph 1).
2. The documents hereto annexed consist of the original probate above referred to and the original codicil made by the deceased but not discovered until after the said probate had been granted.
3. I am the executor (or one of the executors) named in the said codicil (and power should be reserved for the other executor(s) named therein to prove (c)).
4. I will faithfully administer according to law all the estate which by law devolves upon and vests in the personal representative of the deceased by virtue of the grant hereby sought and will render a just and true account of such estate whenever required by law so to do and I will when required by the court deliver up thereto the said grant.

Execution (as in Form 78).

Address for service (as in Form 2).

Notes:

- (a) This form should be used only where the applicant is not a proving executor of the will: section 61(2) of the Act.
- (b) Every executor to whom probate of the will has already been granted shall be named as respondent and be served with a copy of the petition, the new codicil and the supporting affidavit: rule 48(4).
- (c) Delete if not required.

FORM 98

[Rule 18(1)]

*Renunciation of Right to Apply for Letters of Administration Intestate**(Heading as in Form 1)*

WHEREAS the above-named AB of
died on the *(date)*
 ..at *(state where)*intestate leaving him surviving
 myself, CD, *(full name, address and description)* together with other relatives,
 namely, *(set out)*:

Now I, CD, hereby renounce all my right and title to letters of
 administration of the estate of the deceased.

Signed by the said CD the
, 20, in the presence of *(name, address and description of witness)**

.....
CD

Witness

Filed by *(as in Form 2)*.

*The witness should be a person not interested in the estate of the
 deceased.

FORM 99

[Rule 18(1)]

*Renunciation of Right to Apply for Letters of Administration with Record of Terms of Oral Will Annexed**(Heading as in Form 1)*

WHEREAS the above-named AB of
died on the
, 20, having made a valid oral will on
 the
, 20, wherein he did not name any executor but appointed me
 the undersigned, CD, his residuary legatee *(or as the case may be)*

Now I, CD, of
hereby renounce all my right and title to letters of administration
 of the estate of the deceased with a record of the terms of the said oral will
 annexed.

Signed by *(as in Form 98)*.Filed by *(as in Form 2)*.

FORM 100

[Rule 18(1)]

*Renunciation of Right to Apply for Letters of Administration with Written Will Annexed**(Heading as in Form 1)*

WHEREAS the above-named AB of
.....died on the
....., 20, having made and duly executed his last written will dated
the
....., 20(and a codicil thereto dated the
....., 20) wherein
he did not name any executor but appointed me the undersigned, CD, his
residuary legatee (*or as the case may be*).

Now I, CD, of
.....hereby renounce all my right and title to letters of administration
with the said will (and codicil) annexed of the estate of the deceased.

Signed (*as in Form 98*).

Filed by (*as in Form 2*).

FORM 101

[Rule 18(1)]

*Renunciation of Right to Probate of Written Will (a)**(Heading as in Form 1)*

WHEREAS the above-named AB of
 died on the, 20,
 having made and duly executed his last will dated the
, 20(and codicil thereto
 the, 20)
 wherein he appointed the undersigned, CD, to be executor thereof (and
 residuary legatee thereunder) (b).

Now I, CD, of (address)
hereby declare that I have not intermeddled in the estate
 of the deceased and will not hereafter intermeddle therein with intent to
 defraud creditors, and I hereby renounce all my right and title to probate
 and execution of the said will (and codicil) (and to letters of administration
 (with the said will (and codicil) annexed of the estate of the deceased (b)).

Signed (*as in Form 98*).

Filed by (*as in Form 2*).

Notes:

- (a) Renunciation need not be in writing; section 59 of the Act.
 - (b) As to the addition of these words see rule 18(2).
-

FORM 102

[Rule 18(1)]

*Renunciation of Right to Prove Oral Will (a)**(Heading as in Form 1)*

WHEREAS the above-named AB of
died on the.....
, 20, having made a valid oral will on the
,20, wherein he appointed the
 undersigned CD to be executor thereof (and residuary legatee thereunder
 (b)).

Now I, CD, of (*address*)
hereby declare that I have not intermeddled
 in the estate of the deceased and will not hereafter intermeddle therein
 with intent to defraud creditors, and I hereby renounce all my right and
 title to probate and execution of the said will (and to letters of administration
 with a record of the terms of the said will annexed (b)).

Signed (*as in Form 98*).Filed by (*as in Form 2*).*Notes:*

- (a) Renunciation need not be in writing: section 59 of the Act.
 - (b) As to the addition of these words see rule 18(2).
-

FORM 104

[Rule 59(5)]

*Summons (General Form)**(Heading as in Form 1)*

LET ALL PARTIES CONCERNED attend the
Judge/Resident Magistrate in Chambers on the
, at
o'clock in thenoon on the hearing of
 an application on the part of AB (*name, address and description of applicant*)
for an order that (*set
 out the relief sought in numbered paragraphs including costs, if claimed, stating
 by whom or how they are to be paid or provided for*)

 which application will be grounded upon the affidavit(s) of (name)

filed herewith the nature of the case and the
 reasons to be offered.

Dated the, 20

Applicant (or Advocate)

Issued on the, 20

District Registrar

Address for service (*as in Form 2*).

FORM 105

[Rule 46(1)]

*Summons by Child of Deceased who Died Intestate for Order under
Section 35(3) of the Act (a)**(Heading as in Form 1)*

LET ALL PARTIES CONCERNED (continue as in Form 104)
for an order that such share as the court thinks fit of the capital of the
net estate of the above-named AB who died intestate on the
..... 20.....,
be appointed by way of gift to the applicant without variation of any
appointment already made (or with the following variation in the
appointment already made (*set out*)).....
.....
..... and that the costs of this
application be provided for, which application (*continue as in Form 104(b)*).

Dated

Issued (*As in Form 104*).Address for service (*as in Form 2*).*Notes:*

- (a) Although the applicant must be a child of the deceased within the meaning of section 3 of the Act he need not be below the age of majority. If he is a minor he must apply through a next friend or guardian appointed by the court.
 - (b) For supporting affidavit see Form 17.
-

FORM 106

[Rule 45(1)]

*Summons by Dependant under Section 26 of the Act brought after Grant has been Applied for but not Confirmed**

(Heading as in Form 1)

LET ALL PARTIES CONCERNED (*continue as in Form 104*) for an order that, no grant of representation to the estate of the above-named AB who died on the....., 20....., having been confirmed, such reasonable provision be now made for the applicant as a dependant of the deceased out of his net estate as the court thinks fit and that the costs of this application be provided for, which application (*continue as in Form 104*).

Dated	}	(As in Form 104).
Issued		

Address for service (*as in Form 2*).

*If necessary, the applicant may in the same application submit a claim on behalf of the infant children of the deceased. If a grant has been obtained but not confirmed this form is appropriate but if a grant has been obtained and confirmed no application under section 26 can be brought. If a grant has not been applied for the application under section 26 should be by petition (*see Form 96*).

FORM 107

[Rule 44(1)]

*Summons for Revocation or Annulment of Grant***(Heading as in Form 1)*

LET ALL PARTIES CONCERNED attend the Judge in Chambers on the,20, ato'clock in thenoon on the hearing of an application on the part of, CD, the executor of the last will (and codicil) (or the administrator of the estate) of the above-named AB who died on the 20, for an order that the grant of probate (or letters of administration) to CD made on the20, be revoked (or annulled) on the ground that (*set out as in section 76 of the Act*), which application (*continue as in Form 104*).

Dated }
 Issued } (*As in Form 104*).

Address for service (*as in Form 2*)

*This summons must be issued in the High Court.

FORM 108

[Rule 40(1)]

*Summons for Confirmation of Grant★ (General Form)**(Heading as in Form 1)*

LET ALL PARTIES CONCERNED attend the Judge/Resident Magistrate in Chambers on the 20, at o'clock in the noon on the hearing of an application on the part of CD the executor of the last will of (or administrator of the estate of) the above-named AB who died on the, 20, for orders:—

1. That the grant of probate (or letters of administration intestate (or with will annexed)) made to the said CD in this matter on, 20, be confirmed.
2. That the costs of this application be costs in the cause.

Which application (*continue as in Form 104*).

Dated }
 Issued } (*As in Form 104*).

Address for service (*as in Form 2*).

★For supporting affidavits see Forms 8 and 9.

FORM 109

[Rule 40(2)]

*Summons for Confirmation of a Grant Within Six Months under Section
71(3) of the Act**(Heading as in Form 1)*

LET ALL PERSONS CONCERNED (continue as in Form 104) for an order that the grant of probate (or letters of administration (intestate)) made to the applicant by this Honourable Court in this cause on the
, 20
, be confirmed notwithstanding that six months from the date of the grant shall not have expired and that the costs of this application be paid out of the estate, which application (continue as in Form 104).*

Dated }
 Issued } (*As in Form 104*).

Address for service (*as in Form 2*).

*For form of affidavit *see Form 18*.

FORM 110

[Rule 43(1)]

*Summons for Rectification of Grant**(Heading as in Form 1)*

LET ALL PARTIES CONCERNED (*continue as in Form 104*) on the hearing of an application on the part of, CD, the executor of the last will (and codicil) (or the administrator of the estate) of the above-named AB who died on the, 20, for orders:—

1. That the grant of probate (or letters of administration) issued to the said CD in this matter on the, 20, be rectified in the following respects as provided for by Rule 43(1) of the Probate and Administration Rules (*set out in full the desired rectification*).
2. That the costs of this application shall be provided for.

Which application (*continue as in Form 104*).

Dated }
 Issued } (*As in Form 104*).

Address for service (*as in Form 2*).

FORM 111

[Rule 40(5)]

*Warning to Caveator of Application for Confirmation of Grant**(Heading as in Form 1)*

To: (name)
whose address for service is (state)
 and who has entered a caveat in the estate of the above-named
 AB who died on the, 20

YOU ARE HEREBY WARNED that—

1. An application for the confirmation of the grant of probate (or letters of administration) made to CD of
 on the
20 was made
 by (name) on the
, 20
2. If you wish to challenge such proposed confirmation you must file an affidavit of protest in the prescribed form* in the Principal Registry of the High Court at Nairobi within fifteen days from the receipt hereof.

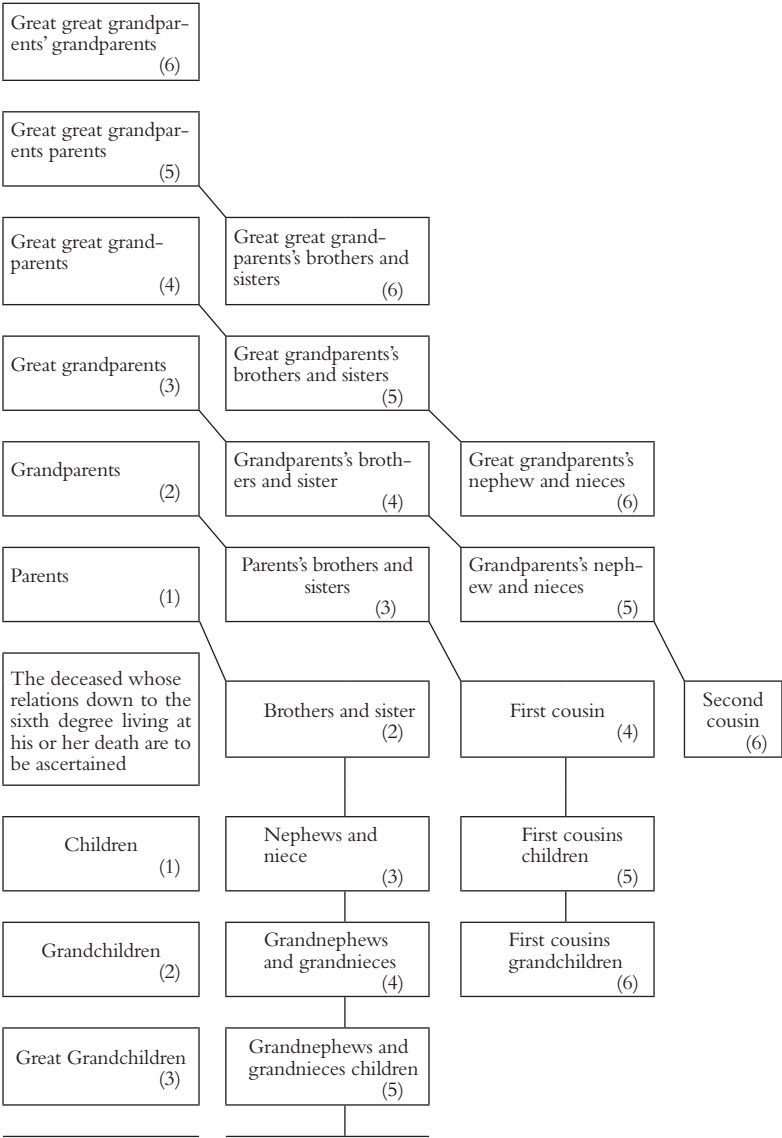
AND TAKE NOTICE that in default of your so doing the said grant may be confirmed notwithstanding your caveat.

Dated the, 20

.....
Principal Registrar

*See Form 10.

TABLE OF CONSANGUINITY



Great great grandchildren (4)	Grandnephews and grandnieces grandchildren (6)
Great great grandchildren's children (5)	
Great great grandchildren's grandchildren (6)	

1. The purpose of this Schedule, which applies only in a case of whole or partial intestacy, is to enable effect to be given to section 39(1)(e) of the Act and rule 7(1)(e)(i). In the table the word “children” and cognate terms must be accorded, in addition to their strict meaning, the extended meanings provided by section 3(2) and (3) of the Act. The construction afforded by paragraph 20 of the First Schedule to the Act to the word “child” has application only to the construction of wills.

2. In addition, the under-mentioned terms have the meanings shown—

“**first cousin**” means the child of an aunt or uncle of the deceased;

“**nephew**” and “**niece**” mean a child of a brother or sister of the deceased;

“**second cousin**” means a grandchild of a grand aunt or grand uncle of the deceased,

and unless otherwise indicated references are to persons of either sex and of any age, e.g. the word “**parents**” includes both father and mother and “**children**” includes both sons and daughters.

3. The figures in brackets against each relative indicate the degree of consanguinity of that person from the deceased.

4. In determining the degree of consanguinity of a person from the deceased by tracing through an intermediate relative it is not necessary that such relative was living at the death of the deceased, e.g. a grandchild of the deceased living at the latter's death would be included among the relatives notwithstanding that his parent (i.e. the deceased's child) had died before the deceased.

Procedure in the Law of Succession in Kenya

About the Author

Justice Mary Ang'awa holds LL.B and LL.M degrees from the University of Nairobi. She is an advocate of the High Court of Kenya and a Puisne Judge. She is a fellow of the Chartered Institute of Arbitrators. She has taught the law of succession to judicial officers and advocates of the High Court of Kenya.

ISBN 978-9966-031-12-9



9 789966 031129